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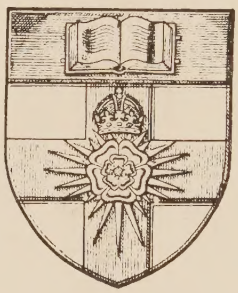

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LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

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1910.—VOL. I.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

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The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1910, will be as follows:—

In the First Series,
[1910] 1 Ch. [1910] 2 Ch.

In the Second Series,
[1910] 1 K. B. [1910] 2 K. B. [1910] P.

In the Third Series,
[1910] A. C.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re NASH.

COOK *v.* FREDERICK.

[1908 N. 1380.]

C. A.
1909
Oct. 23;
Nov. 2, 11.

Settlement—Real Property—Appointment—Validity—Remoteness—Rule against Double Possibilities—Successive Limitations to Unborn Children—Election.

The rule commonly known as the rule against double possibilities, namely, that after an estate has been limited to an unborn person for life a remainder cannot be limited to any child of that unborn person, applies to equitable as well as legal estates.

So held upon the authority of *Monypenny* v. *Dering*, (1852) 2 D. M. & G. 145.

Where by his will a testator makes an appointment which is held to be invalid as transgressing the rule against double possibilities, and also confers benefits upon the persons entitled in default of appointment, no question of election arises.

In re Oliver's Settlement, [1905] 1 Ch. 191, approved and followed

In re Bradshaw, [1902] 1 Ch. 436, overruled.

Decision of Eve J., [1909] 2 Ch. 450, affirmed.

APPEAL from a decision of Eve J. (1)

By a settlement dated January 24, 1833, made on the marriage of Andrew John Nash and Elizabeth Nash, certain freehold hereditaments and premises were assured by A. J. Nash to the trustees of the settlement upon trust, after the decease of the survivor of A. J. Nash and Elizabeth Nash, for all

(1) [1909] 2 Ch. 450.

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and every, or such one or more of the children, grandchildren, or more remote issue, respectively, of the said A. J. Nash and Elizabeth Nash (such grandchildren or other more remote issue to be born before such appointment as thereinafter mentioned), and at such age or respective ages, and, if more than one, in such parts, shares, and proportions, and with such provisions as the said A. J. Nash, at any time, and from time to time, by deed or by will, should direct, limit, or appoint, and in default of such direction, limitation, or appointment, and subject to such as should have been made, upon trust that the trustees and the survivor of them and the heirs of such survivor, their and his assigns, should assure the said freeholds unto the child, if only one, or, if more than one, unto and between all the children of A. J. Nash and Elizabeth Nash, equally to be divided between them, and in case any of the children of the marriage should die under twenty-one, without leaving any issue living at his or her death, to transfer the original share of such child in the freehold hereditaments to the other or others of the same children, equally to be divided between them as tenants in common. There were two children only of the marriage who lived to attain twenty-one, namely, Lydia Emily Frederick and Jessie Marian Garnham. Jessie Marian Garnham married in 1856, and died leaving two daughters only who attained twenty-one, namely, the defendants Jessie Maude Garnham and Edith Emily Jellicorse. Lydia Emily Frederick married in 1859, and died leaving two children only who attained twenty-one, namely, the defendant Sir Charles Arthur Andrew Frederick and the defendant Olive Emily Sebright.

By his will, dated November 9, 1887, in exercise of the power conferred on him by the settlement of January 24, 1833, A. J. Nash purported to appoint that the trustees of the settlement for the time being should, after the decease of the survivor of himself and his wife, stand possessed of the said freehold hereditaments and premises as to one equal undivided moiety thereof, upon trust to pay to or permit Lydia Emily Frederick to receive the annual income thereof during her life for her separate use, and after her decease should stand possessed of such moiety in trust for her children, Sir Charles Arthur Andrew Frederick and

Olive Emily Sebright, in equal shares, absolutely; and as to the other moiety thereof in trust to pay to or permit Jessie Marian Garnham to receive the annual income thereof for her life, for her separate use, and after her death to stand possessed of such moiety in trust for her daughters, Jessie Maude Garnham and Edith Emily Jellicorse, in equal shares, absolutely.

The testator also gave life interests in his residuary estate to his two daughters, Lydia Emily Frederick and Jessie Marian Garnham. These interests exceeded in value the property comprised in the settlement.

The testator A. J. Nash died on April 24, 1888, and Elizabeth Nash died on June 3, 1897.

Lydia Emily Frederick died on November 10, 1907, having by her will, made in 1901, given her real and personal property to her husband, whom she appointed her sole executor.

Mrs. Garnham survived her husband and died in 1909, having by her will, made in 1902, left all her property to her daughters, Jessie Maude Garnham and Edith Emily Jellicorse, absolutely, in equal shares, as tenants in common.

The executors of Mrs. Frederick and Mrs. Garnham and the trustees of the marriage settlements of Mrs. Sebright and Mrs. Jellicorse were also made defendants to the action.

A summons was taken out on October 21, 1908, by the trustees of the settlement of January 24, 1833, to determine, inter alia, (1.) whether the appointment by the will of A. J. Nash operated as a valid exercise of the power of appointment contained in the settlement so far as regarded the appointments in favour of the defendants Sir Charles Arthur Andrew Frederick and Olive Emily Sebright and the defendants Jessie Maude Garnham and Edith Emily Jellicorse respectively; (2.) if the appointment was not a valid exercise of the power, or failed as to any part thereof, whether the representatives of Lydia Emily Frederick and Jessie Marian Garnham, the persons entitled in default of appointment, were put to their election to confirm the said appointments.

Eve J. held, first, on the authority of *Monypenny* v. *Dering* (1), that the rule that after an estate has been limited to an unborn

(1) 2 D. M. & G. 145.

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person for life a remainder cannot be limited to any child of such unborn person applied to equitable as well as to legal interests in land, and that consequently the appointment under the will of the testator was not a valid exercise of the power of appointment so far as regarded the limitations in favour of the defendants Sir Charles Frederick and Mrs. Sebright and the defendants Miss Jessie Maude Garnham and Mrs. Jellicorse; secondly, on the authority of *In re Oliver's Settlement* (1), that the representatives of Mrs. Frederick and Mrs. Garnham, the persons entitled in default of appointment, were not put to their election.

Mrs. Sebright and the trustees of her marriage settlement appealed.

P. O. Lawrence, K.C., and *E. Beaumont*, for the appellants. The question is whether the rule against double possibilities, which in *Whitby* v. *Mitchell* (2) was held to apply to legal limitations of real estate, is applicable to equitable interests. In *In re Bowles* (3) Farwell J. held that the rule only existed to the extent stated in *Whitby* v. *Mitchell* (2), and consequently that it did not apply to personal estate. It is an artificial and fantastic rule of law invented by Lord Coke: see Fearne on Contingent Remainders, 10th ed. vol. i. pp. 250, 251; it is purely a rule of common law, and it is not applicable to equitable estates. In Gray on Perpetuities, 2nd ed. p. 260, it is treated as a non-existent rule based on an exploded theory, and, apart from that rule, there is no reason for impeaching the limitations in question in this case, since there is no tying up of the land for a longer period than is allowed by the rule against perpetuities. It is true as a general proposition that equity follows the law, but it does not follow the law blindly; it only follows the law when it sees it is beneficial. Thus equity has never allowed an equitable remainder to be defeated by the tortious act of the particular tenant or by the prior failure of the particular estate. Eve J. thought that the question was concluded by *Monypenny* v. *Dering* (4), but it is submitted that Lord St. Leonards, in the passage cited by Cotton L.J. in *Whitby* v. *Mitchell* (5) as referring to the rule

(1) [1905] 1 Ch. 191.
(2) (1890) 44 Ch. D. 85.
(3) [1902] 2 Ch. 650.
(4) 2 D. M. & G. 145.
(5) 44 Ch. D. 90.

against double possibilities, was not referring to that rule at all, but to the rule against perpetuities, which is frequently spoken of as a rule against limiting successive estates to unborn persons. In *Monypenny* v. *Dering* (1) a case was ordered for the opinion of the Court of Exchequer, and in that Court the ratio decidendi was remoteness, the rule against double possibilities not being mentioned. Lord St. Leonards purported to follow that decision, and although his language is ambiguous, presumably he was referring to the rule against perpetuities. That case has always been treated as a decision upon remoteness simply. Even Cotton L.J. does not say that the Lord Chancellor based his decision on the rule against double possibilities; he merely says that the Lord Chancellor recognized the rule as an existing rule. If this point had really been decided by *Monypenny* v. *Dering* (1) there would have been no necessity for the very elaborate judgments delivered by the Court of Appeal in *Whitby* v. *Mitchell.* (2) Looking at all the circumstances in *Monypenny* v. *Dering* (1), the proper inference is that all the parties were treating the rule to be as stated in *Cadell* v. *Palmer.* (3) So Wood V.-C. in *Cattlin* v. *Brown* (4), quoting from Mr. Preston's learned argument in *Mogg* v. *Mogg* (5), states the rule applicable to equitable estates thus: "A gift to an unborn child for life is good if it stops there; but if a remainder is added to his children or issue as purchasers, it is not good, unless there be a limitation of the time within which it is to take effect." That shews that the only requirement in equity is that the time shall be limited within which the limitation shall take effect.

[FLETCHER MOULTON L.J. The Vice-Chancellor does not limit the rule to equitable estates.]

There is only one rule against perpetuities, and that rule is frequently stated as it was stated by Lord St. Leonards in *Monypenny* v. *Dering.* (1) The rule against double possibilities is not directed to perpetuities at all, although it may operate to prevent perpetuities.

(1) 2 D. M. & G. 145.
(2) 44 Ch. D. 85.
(3) (1833) 1 Cl. & F. 372.
(4) (1853) 11 Hare, 372, 375.
(5) (1811) 1 Mer. 654.

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[FARWELL L.J. It is treated as a rule against perpetuities in Viner's Abridgement.

Jessel, K.C. And in Fearne on Contingent Remainders, 10th ed. vol. i. p. 502.]

In *Whitting* v. *Whitting* (1), on which Eve J. also relied, it does not appear that this question was dealt with at length, and the main ground of decision was that the limitation transgressed the rule against perpetuities. [Reference was also made to *Cole* v. *Sewell* (2), *In re Frost* (3), *In re Ashforth* (4), Co. Litt. 342 b (Butler's note), and Encyclopædia of Forms, vol. i. p. 612.]

Jessel, K.C., and *Wurtzburg*, for persons entitled in default of appointment. In *Monypenny* v. *Dering* (5) the Lord Chancellor must have held that the rule was the same in the Courts of Equity as in the Courts of law. There is nothing to suggest any distinction for the purpose of this rule between legal and equitable estates, and there is no indication in the judgment of the Lord Chancellor that the case was decided on any other ground. That, therefore, is a decision on the point binding on this Court, and that is recognized by the Court of Appeal in *Whitby* v. *Mitchell.* (6) Further, the rule embodies a sound principle, namely, the prevention of the tying up of estates for successive generations; it is based upon considerations of public policy, and in such a case the Court ought not to differentiate between legal and equitable interests. Such a distinction would lead to very anomalous results, and, in the language of Farwell J. in *In re Ashforth* (7), it is undesirable to add to the anomalies which adorn our laws. This is a case in which equity ought to follow the law: *Humberston* v. *Humberston.* (8)

T. T. Method, for the trustees of the settlement of 1833.

E. Beaumont in reply.

Cur. adv. vult.

Nov. 2. FARWELL L.J. delivered the judgment of the COURT (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) as follows:—

The question on this appeal is whether the rule of law that

(1) (1908) 53 Sol. J. 100.
(2) (1843) 4 D. & War. 1, 28.
(3) (1889) 43 Ch. D. 246.
(4) [1905] 1 Ch. 535.
(5) 2 D. M. & G. 145.
(6) 44 Ch. D. 85.
(7) [1905] 1 Ch. 545.
(8) (1716) 1 P. Wms. 332.

forbids the limitation of land to an unborn child for life with remainder to his unborn child applies to equitable estates. It has been settled by *Whitby* v. *Mitchell* (1) that the rule is antecedent to and independent of the modern rule against perpetuities in respect of legal estates in land, and the question for us is whether the fact that the estates are equitable makes any difference. Our Courts have from the earliest times set their face against the suspense or abeyance of the inheritance and have from time to time laid down various rules to prevent perpetuity. One of those is the rule that a preceding estate of freehold is indispensably necessary to support a contingent remainder: Co. Litt. 342 b, Butler's note; another is the rule laid down in 1669 in *Purefoy* v. *Rogers* (2) that no limitation shall be construed as an executory or shifting use which can by possibility take effect by way of remainder; and another (and probably the oldest) was the rule in question forbidding the raising of successive estates by purchase to unborn children, i.e., to the unborn child of an unborn child. The most modern rule, arising out of the development of executory limitations and shifting uses, is what is now usually called the rule against perpetuities, namely, that all estates and interests must vest indefeasibly within a life in being and twenty-one years after. But this is an addition to, not a substitution for, the former rules; for example, apart from recent legislation (40 & 41 Vict. c. 33), a contingent remainder failed for want of a particular estate, whether the remainder was to take effect within a life or lives in being and twenty-one years after or not; and the rule of *Purefoy* v. *Rogers* (2) was equally unaffected by any such consideration. It is argued that sufficient protection against perpetuity is given by the modern rule and that equity does not always follow the law; for example, in the very case of the destructibility of remainders. But this is a case of real property law and therefore of authority, in order not to disturb titles, and in our opinion the point on this appeal has been decided by authority binding on us, namely, *Monypenny* v. *Dering*. (3) The limitations in that case were equitable; the

(1) 44 Ch. D. 85.

(2) (1669) 2 Wms. Saund. (Ed. 1871), 768, 781—9.

(3) 2 D. M. & G. 145.

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report in the Court below (1) shews that the first limitation was unto and to the use of the trustees; and Lord St. Leonards (2) expressly states that the legal fee was given to the trustees. The point (relevant to the present case) that was therein decided was that the limitations to the unborn child of Phillips Monypenny with remainder to his unborn son were void. It was urged that when the Lord Chancellor said that they were too remote he was referring to the modern rule against perpetuities and not to the old law. In our opinion this cannot be so. Mr. Malins in his argument (3) contended that the limitations were contingent remainders, and "such a remainder could not be void for remoteness," for which he cites the Lord Chancellor's own decision in *Cole* v. *Sewell*. (4) The reasons for that decision are there given, and it is apparent that they do not apply to equitable estates, because a particular estate is not necessary in equity to support a contingent remainder. There were, therefore, two answers to Mr. Malins' arguments—(1.) *Cole* v. *Sewell* (4) does not apply to equitable remainders; (2.) admitting that it does apply, it is irrelevant because of the older rule, of which Lord St. Leonards says (5) that although obsolete "it has rendered void successive life estates to successive unborn classes of issue." Turning to p. 168 of 2 D. M. & G., we find that the Lord Chancellor distinguishes *Cole* v. *Sewell* (4) on this latter ground: "In *Cole* v. *Sewell* (4) I said that the rule against a limitation to an unborn son of an unborn son was unaffected by what I there laid down." And in the judgment at p. 170 he says: "If the issue of Phillips Monypenny had been born in the lifetime of the testator, the devise would have been valid; but Phillips Monypenny never had any issue, and with regard to him no one is provided for but his first unborn son and the first unborn son of that unborn son and the heirs male of the body of that son; the limitation in default of such son being to all other the son and sons of Phillips Monypenny in like manner. Then the rule of law forbids the raising of successive estates by purchase to unborn children, that is, to

(1) (1850) 7 Hare, 568.
(2) 2 D. M. & G. 169.
(3) 2 D. M. & G. 165.
(4) 4 D. & War. 1, 28.
(5) Ibid. 32.

an unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon; and the result therefore is, taking the limitation as it stands, that there is a good life estate to Phillips Monypenny and to his first unborn son if he had one, and that the remainder to the other sons and their issue is absolutely void, as being upon too remote a contingency." We do not see any ambiguity in this; but if there be, it is rendered clear by the report in the *Law Journal* (1), which says: "If the issue of Phillips had been born in the lifetime of the testator, these would have been valid devises; but Phillips never had any issue born; and the persons provided for are his first unborn son and the first unborn son of that unborn son, and the heirs male of his body; the limitations in default of such issue being to all the other sons of Phillips in like manner. The rule of law prohibits you from raising successive estates by purchase to unborn children, that is to a child of an unborn child; therefore the remainder to the other sons of Phillips is absolutely void, as too remote."

Further, at this time it had never been decided, and, as I have shewn, was not even suggested by Lord Chancellor or counsel, that the modern rule against perpetuities extended to contingent remainders in equitable estates; this was so decided for the first time in *Abbiss* v. *Burney*. (2) If *Monypenny* v. *Dering* (3) was decided on that ground, it is strange that it was not cited in that case, as the judge who decided it in the Court below and was reversed on appeal was Malins V.-C., who had been counsel in *Monypenny* v. *Dering*. (3) It is said against this that *Whitby* v. *Mitchell* (4) might have been easily decided without all the argument expended on it on the authority of *Monypenny* v. *Dering* (3); but *Whitby* v. *Mitchell* (4) was a case of legal limitations, and it was probably thought desirable to take the line of least resistance, namely, the clear decisions on legal estates at law, without entering upon cases in equity at all.

We are of opinion that the rule against limiting land to an unborn child for life with remainder to his unborn child applies to equitable as well as to legal estates. We think that the rule

(1) 22 L. J. (Ch.) 313, 316.
(2) (1881) 17 Ch. D. 211.
(3) 2 D. M. & G. 145.
(4) 44 Ch. D. 85.

C. A. 1909 NASH, *In re.* COOK *v.* FREDERICK.

should be so expressed, and that the phrase "possibility upon a possibility" should not be used. It was due to Lord Coke's love of scholastic logic; it never was a general rule—see *Blamford* v. *Blamford* (1) and *Lampet's Case* (2)—although it was, no doubt, given by Lord Coke as a reason for the real and intelligible rule that estates cannot be limited to an unborn child for life with remainder to his unborn child. But the rule is well established, whatever its reason may have been, and the fact that Lord Coke gave a reason for it three centuries ago that now seems fantastic or unintelligible to us cannot affect the validity of the rule itself.

We think that Eve J. was quite right and that this appeal should be dismissed with costs.

Nov. 11. The question of election was now argued.

E. Beaumont (*P. O. Lawrence, K.C.*, with him), for the appellants. The persons entitled in default of appointment cannot at the same time claim against the appointment under the testator's will and take advantage of the testator's bounty in respect of his free property. They cannot approbate and reprobate: *In re Bradshaw.* (3) *In re Oliver's Settlement* (4), no doubt, is a decision to the contrary, and that case has since been followed in *In re Beales' Settlement* (5) and *In re Wright.* (6) I adopt as part of my argument the observations in the preface of Theobald on Wills, 7th ed. p. vii., where the learned author defends the view taken by Kekewich J. in *In re Bradshaw.* (3)

Jessel, K.C., and *Wurtzburg*, for the respondents, were not called upon.

COZENS-HARDY M.R. This appeal raises a point of law upon which perhaps twenty or thirty years ago there might have been some discussion, but in recent times one view of the question has been taken by James V.-C. in *Wollaston* v. *King* (7), by Pearson J. in *In re Warren's Trusts* (8), by Farwell J. in *In re Oliver's Settlement* (4), by Warrington J. in *In re Beales' Settlement* (5), by Buckley J. in *In re Wright* (6), and by the Court

(1) (1615) 3 Bulst. 98, 108.
(2) (1612) 10 Rep. 46 b, 50 b.
(3) [1902] 1 Ch. 436.
(4) [1905] 1 Ch. 191.
(5) [1905] 1 Ch. 256.
(6) [1906] 2 Ch. 288.
(7) (1868) L. R. 8 Eq. 165.
(8) (1884) 26 Ch. D. 208.

of Appeal in Ireland in *In re Handcock's Trusts.* (1) The contrary view has been taken by Kekewich J. in *In re Bradshaw* (2), a case which no less than three judges have declined to follow. I feel myself no doubt that the view taken by the majority of the judges is the sound one, and I do not think that I can usefully add anything more than to say that I desire for myself to adopt not merely the decision but the careful and elaborate reasoning of Farwell J. in the case of *In re Oliver's Settlement.* (3) The result is that the decision of Eve J. on both branches of the appeal is affirmed, and that the appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I agree.

FARWELL L.J. I also agree.

Solicitors: *Tylee & Co.; Sharpe, Pritchard & Co.; Budd, Brodie & Hart.*

(1) (1889) 23 L. R. Ir. 34. (2) [1902] 1 Ch. 436.
(3) [1905] 1 Ch. 191.

H. B. H.

outh Eastern Ry. Co. v. *Associated Portland Cement Manufacturers* [1910] 1 Ch. 12.
Followed. HUTTON *v.* WATLING [1948] 1 Ch. 26

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SOUTH EASTERN RAILWAY COMPANY *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED.

[1909 S. 235.]

Railway—Accommodation Works—Agreement—Severed Lands—Grant of Right to make "a Tunnel"—Place and Time indefinite—Personal Contract—Interest in Land—Uncertainty—Perpetuity—Ultra vires—Assignability—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 71.

By an accommodation works agreement of May 31, 1847, a railway company, who were purchasing a strip of land for their line, agreed that the landowner, his heirs, appointees, or assigns, might at any time thereafter at his or their own expense make a tunnel thereunder to join the lands severed thereby. The company also agreed to make a certain defined level crossing.

On December 31, 1847, the landowner conveyed the strip to the railway company, reserving to himself, his heirs, appointees, and assigns, the defined level crossing and the right to make a tunnel at his or their own expense, the level crossing and the privilege of making a tunnel being accepted in lieu of all other accommodation works. The site of the tunnel was in no way defined:—

Held, affirming Swinfen Eady J.—(1.) that as against the original covenantors, the railway company, the provision in the agreement as to the tunnel was a personal contract and was not obnoxious to the rule against perpetuities.

London and South Western Ry. Co. v. *Gomm*, (1882) 20 Ch. D. 562, explained and distinguished.

(2.) That the benefit of that contract could be specially assigned to a lessee of part of the severed lands during the continuance of the lease.

Held, further, by Swinfen Eady J.—(*a*) that as the agreement and reservation amounted to a regrant of an easement by the railway company to the landowner, and not to an exception out of the land granted by him to the company, the right to select the site of the tunnel was vested in the landowner, his heirs, appointees, and assigns, and the agreement and reservation were not void for uncertainty.

Sanderson v. *Cockermouth and Workington Ry. Co.*, (1849) 11 Beav. 497; (1850) 2 H. & T. 327, 331, applied.

Pearce v. *Watts*, (1875) L. R. 20 Eq. 492, and *Savill Brothers, Ld.* v. *Bethell*, [1902] 2 Ch. 523, explained and distinguished.

(*b*) That the grant of the easement was not ultra vires.

In re Gonty and Manchester, Sheffield, and Lincolnshire Ry. Co., [1896] 2 Q. B. 439, applied.

(c) That the agreement was also valid as an agreement for a further accommodation work under s. 71 of the Railways Clauses Consolidation Act, 1845.

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WITNESS ACTION.

This was an action to restrain the defendants from making a tunnel under the plaintiffs' line without their consent.

By an agreement under hand dated May 31, 1847, and made between the plaintiffs' agent of the one part and the agent of John Hales Calcraft of the other part, after reciting that the plaintiffs required to purchase certain land at Northfleet belonging to John Hales Calcraft for the purposes of a proposed branch railway, and, the parties being unable to agree the amount of compensation, the question had been referred to an arbitrator, but inasmuch as the arbitrator had no power to determine to what accommodation works John Hales Calcraft would be entitled for the more convenient use of the land severed by the proposed branch railway the parties had consented to enter into this agreement for the purpose of securing to John Hales Calcraft, his heirs, appointees, and assigns, the rights and privileges thereinafter provided, it was agreed that the plaintiffs should make and maintain a certain defined level crossing over the railway for the use of John Hales Calcraft, his heirs, appointees, or assigns, and the occupiers for the time being of the land adjoining thereto or occupied therewith.

It was further agreed that "if the said John Hales Calcraft his heirs appointees or assigns shall at any time hereafter be desirous that a tunnel or archway under the said proposed railway (where it passes or is intended to pass through the said land required to be purchased by the said company) shall be constructed for the purpose of carrying chalk or other materials to or from the south side of the line of the said proposed railway for shipment on the river Thames or for any other purpose he or they shall be at liberty at his or their own costs and expenses to construct such a tunnel or archway provided that in the construction thereof he or they does not or do not in any way interfere with the said branch railway or impede the traffic on the line thereof and provided that the said tunnel or arch is constructed to the satisfaction and under the direction of the

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engineer of the said company. And it is hereby expressly understood and agreed that all costs damages and expenses (if any) which may be incurred or sustained by the said company in consequence of the formation and maintenance of the said tunnel or archway shall be paid to them their successors or assigns by the said John Hales Calcraft his heirs appointees or assigns. And lastly it is hereby agreed that the said company their successors or assigns shall not be required to make any further or other accommodation works for the use of the said John Hales Calcraft his heirs appointees and assigns other than the level crossing aforesaid."

By a conveyance by deed poll dated December 31, 1847, John Hales Calcraft and a judgment creditor conveyed the land to the plaintiffs, their successors and assigns, in consideration of 2040*l.* paid to John Hales Calcraft, to hold the same freed and discharged from the judgment debt unto the plaintiffs, their successors and assigns, for ever according to the true intent and meaning of the plaintiffs' Acts of Parliament, "Subject nevertheless to and reserving always to me the said John Hales Calcraft my heirs appointees and assigns and for my and their use and benefit and for the use and benefit of the occupiers for the time being of the lands and hereditaments adjoining to the said lands and hereditaments hereby assured or intended so to be or occupied with such adjoining land and hereditaments one good and sufficient crossing for horses carts and carriages on a level with the rails of the said proposed railway" (here follows a description of the level crossing) "And also the right and liberty to and for me the said John Hales Calcraft my heirs appointees and assigns to construct at my or their own costs and expenses a tunnel or archway under the said proposed railway where it passes or is intended to pass through or over the said pieces or parcels of land and hereditaments hereby assured or intended so to be for the purpose of conveying chalk or other materials to or from the south side of the line of the said proposed railway for shipment on the river Thames or for any other purpose Provided that in the construction thereof I or they do not in any way interfere with the said proposed railway or impede the traffic on the line thereof and provided that

the said tunnel or arch be constructed to the satisfaction and under the direction of the engineer of the said company And upon the understanding that I the said John Hales Calcraft my heirs appointees or assigns do well and fully indemnify the said company their successors or assigns against all costs damages and expenses which may be incurred or sustained by them in consequence of the formation and maintenance of the said tunnel or archway . . . . And I the said John Hales Calcraft do hereby for myself my heirs executors and administrators covenant and declare with and to the said company their successors and assigns that" (here follow covenants for title) "and also that the said sum of 2040*l.* is accepted by me in full satisfaction of all compensation whatsoever to which I or any persons . . . . claiming . . . . under . . . . me . . . . may be entitled for any damage by severance or otherwise . . . . and in lieu bar and satisfaction of all communications works and things which I or any persons . . . . claiming . . . . as aforesaid . . . . might require to be made allowed or performed by the said company . . . . other than and except the said level crossing . . . . and other than and except the privilege of making the tunnel or archway aforesaid and which said level crossing and privilege of constructing a tunnel or archway as aforesaid are provided for by an agreement dated May 31 last . . . ." This land extended 1636 yards along each side of the line.

John Hales Calcraft died on March 13, 1880, having devised and bequeathed all his real and personal estate to William Montague Calcraft.

By a lease dated September 30, 1884, and made between William Montague Calcraft, hereinafter called the lessor, of the one part, and the London Portland Cement Company, Limited, hereinafter called the lessees, of the other part, the lessor demised a portion of the lands on each side of the line to the lessees for fifty-seven years from June 24, 1884, at the rents therein mentioned with full powers of working the chalk. It was thereby agreed that "during the continuance of this demise the rights and privileges and liabilities of the lessor under and by virtue of" the agreement of May 31, 1847, a copy whereof was indorsed

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on the lease, "shall be vested in the lessees who hereby covenant to indemnify the lessor against all costs damages and liabilities in respect of the said agreement or in respect of any works or other things thereby authorised."

On November 1, 1900, this lease was assigned to the defendants.

The lands comprised in this lease were on opposite sides of the line and extended 313 yards along the north side and 690 yards along the south side of the line. They were not connected by the level crossing, so that the only means of access would be by means of a tunnel.

The defendants, having worked out the chalk on the north side of the line, desired to construct a tunnel for the purpose of working the chalk on the south side.

The plaintiffs contended that the defendants had no legal right to make the tunnel without their consent and required a rent of at least 75*l.* a year as a term of consenting. There was, however, no engineering difficulty, and plans were in fact approved without prejudice to the legal question.

The defendants refused to pay any rent and proposed forthwith to construct the tunnel without the plaintiffs' consent in accordance with the approved plans. The plaintiffs thereupon brought this action. The action came on for hearing before Swinfen Eady J. on July 9, 1909.

Micklem, K.C., and *Percy Wheeler*, for the plaintiffs. The termini of the tunnel not being defined as required in the case of similar easements—*Rouse* v. *Bardin* (1)—the right of tunnelling purporting to be created and reserved by the agreement and conveyance of 1847 was void for uncertainty: *Pearce* v. *Watts* (2); *Savill Brothers, Ld.* v. *Bethell.* (3) It was also void for perpetuity, as the site might be selected and the tunnel made "at any time hereafter": *Savill Brothers, Ld.* v. *Bethell* (3); *London and South Western Ry. Co.* v. *Gomm* (4); *Edwards* v. *Edwards* (5); Lewis on Perpetuities, p. 619. The plaintiffs could not in fact

(1) (1790) 1 H. Bl. 351, 355.
(2) L. R. 20 Eq. 492.
(3) [1902] 2 Ch. 523.
(4) 20 Ch. D. 562, 580.
(5) [1909] A. C. 275.

have granted such a right: *Mulliner* v. *Midland Ry. Co.* (1) Even if the right were good in law it could only pass with the entire Northfleet estate. If it passed to the lessees of the portion of the estate leased in 1884 it would pass to the lessees of any other portion subsequently leased: *Newcomen* v. *Coulson* (2); and there might be as many tunnels as there were leases, which was clearly not the intention of the agreement and conveyance of 1847.

Hon. E. C. Macnaghten, K.C., and *MacSwinney*, for the defendants. The right of tunnelling created and reserved in 1847 was not void for uncertainty. It was not necessary to define the actual tunnel or the termini: *Cooke* v. *Ingram* (3); *Sanderson* v. *Cockermouth and Workington Ry. Co.* (4)

No question of perpetuity arises. There was an agreement to grant an immediate easement. It was carried out by the reservation of that easement in the deed poll under which the plaintiffs took possession. This had the effect of an immediate grant by the plaintiffs. The plaintiffs are confusing the creation with the user of the easement. There was no grant of an easement in futuro. There was a grant of an immediate easement which the grantee could use at once or later. The defendants have only just reached the stage of working when the tunnel is required, so there can be no question of abandonment. The easement not being inconsistent with the purposes for which the plaintiffs took the land, they had clear power to grant it: *In re Gonty and Manchester, Sheffield, and Lincolnshire Ry. Co.* (5); *Grand Junction Canal Co.* v. *Petty*. (6) It is really an additional accommodation work within s. 71 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), which the company have agreed to our constructing at any time at our own expense. The right to make the tunnel was obviously assigned to our predecessors by the lease of 1884, and neither the lessor nor any subsequent lessee could have that right unless we released our right.

Micklem, K.C., in reply. *Cooke* v. *Ingram* (3) is not in point.

(1) (1879) 11 Ch. D. 611.
(2) (1877) 5 Ch. D. 133, 141.
(3) (1893) 68 L. T. 671.
(4) 11 Beav. 497; 2 H. & T. 327, 331.
(5) [1896] 2 Q. B. 439.
(6) (1888) 21 Q. B. D. 273.

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In that case the right of way along the new road was granted "to and from every or any part of" the parcels which were described as "adjoining and abutting on" that new road. It was merely a case of estoppel based on *Roberts* v. *Karr* (1), which was explained in *Mellor* v. *Walmesley*. (2)

[SWINFEN EADY J. The right to cross the intervening strip at every point was recognized as valid in law. In the present case the right or easement of making one tunnel was granted. The grantee could select the site. The reservation is nothing like so vague as that in *Sanderson* v. *Cockermouth and Workington Ry. Co.* (3)]

Those were accommodation works to be made at once. The plaintiffs might perhaps have granted a right to make a defined tunnel immediately: *In re Gonty and Manchester, Sheffield, and Lincolnshire Ry. Co.* (4); but they could not have granted a right to select a site and make a tunnel sixty years hence. This would have created a future interest in land void for perpetuity —*Hope* v. *Gloucester Corporation* (5); *London and South Western Ry. Co.* v. *Gomm* (6); *Savill Brothers, Ld.* v. *Bethell* (7); *Egerton* v. *Earl Brownlow* (8)—and repugnant to an estate in fee simple: *In re Rosher* (9); *In re Elliot.* (10) Sect. 71 of the Railways Clauses Consolidation Act, 1845, only authorizes such further accommodation works as shall be agreed to by the railway company. We do not agree to this tunnel.

[SWINFEN EADY J. You agreed sixty years ago and took your land on that basis.]

The section is limited to works that were really required when the railway company took the land: *Rhondda and Swansea Ry. Co.* v. *Talbot.* (11) It does not apply to a case like this.

Lastly, the lease of 1884 did not assign the right of tunnelling to the lessees exclusively so as to preclude the lessor or subsequent assignees from exercising it in respect of the rest of

(1) (1809) 1 Taunt. 495.
(2) [1905] 2 Ch. 164, 175, 180.
(3) 11 Beav. 497; 2 H. & T. 327, 331.
(4) [1896] 2 Q. B. 439.
(5) (1855) 7 D. M. & G. 647.
(6) 20 Ch. D. 562, 580.
(7) [1902] 2 Ch. 523.
(8) (1853) 4 H. L. C. 1, 125.
(9) (1884) 26 Ch. D. 801.
(10) [1896] 2 Ch. 353.
(11) [1897] 2 Ch. 131, 140.

the estate. The right, if valid at all, could not be split in this way.

Cur. adv. vult.

July 31. SWINFEN EADY J. (after stating the facts). The question is whether the defendants have the legal right to make the tunnel. The plaintiffs raise no case on the merits, but rely on legal objections. Of course if those legal objections are good they must prevail. The plaintiffs do not dispute, and on the documents it is indisputable, that the terms on which they acquired the land were that they were to make a level crossing for the accommodation of the adjoining owner, and that he was to have the right to make a tunnel, the level crossing and tunnel to be in lieu of all other accommodation works. Having obtained a conveyance of the land on these terms, they now seek to repudiate one of the terms, saying it is not binding. They raise certain legal questions, which must be considered. If they were to prevail, one cannot help feeling that there would really be an injustice to the landowner, seeing that the right to make the tunnel was one of the terms on which the land was conveyed to the plaintiffs.

The principal objections were, first, that the provision was too uncertain and indefinite to be binding, and, secondly, that it was void for perpetuity. It was contended that the provision was too indefinite because the vendor had a considerable strip of land on each side of the railway and the precise point at which the tunnel was to be made was not defined. The answer to this objection is that the right to make the tunnel and select the spot within the limits of the strip where it was to be made was vested in the vendor, his heirs, appointees, and assigns. He or they had the right of making the tunnel and therefore of determining the spot. The provision is not nearly so indefinite as the provision for accommodation works in *Sanderson* v. *Cockermouth and Workington Ry. Co.* (1), which was enforced in a specific performance action. In that case the plaintiff agreed to sell to the railway company certain lands "subject to the making such roads, ways, and slips for cattle as may be necessary." That was the

(1) 11 Beav. 497; 2 H. & T. 327, 331.

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only provision for accommodation works. No power was given to either party to determine what was necessary. The plaintiff brought a bill for specific performance. The defendants objected (inter alia) that the provision was vague and indefinite, but Lord Langdale M.R. made a decree for specific performance, merely referring it to the Master to inquire what works were necessary. On the appeal Lord Cottenham L.C. said: "What is the contract? It is a contract for the purchase of lands, subject to the duty of making communications between the lands severed by the railway. The defendants having got from the plaintiff a performance of his part of the contract, must not the Court interfere for the purpose of securing to the plaintiff that advantage which he has contracted for?" Those observations are applicable here, the vendor having performed his part of the contract and conveyed the land.

In *Sanderson* v. *Cockermouth and Workington Ry. Co.* (1) it was not a case of the grantor of the land merely claiming to exercise his legal rights, but the Court actively interfered by giving him specific performance in order to secure him the advantage for which he had contracted, referring it to the Master to settle what works were necessary. In the present case the defendants are merely proceeding to make a tunnel under their powers and desire to be left alone. They are not coming to the Court for any relief.

The plaintiffs also relied on *Pearce* v. *Watts* (2) and *Savill Brothers, Ld.* v. *Bethell* (3) to support their objection as to uncertainty. *Pearce* v. *Watts* (2) was the case of an exception. The vendor agreed to sell an estate to the purchaser, reserving "the necessary land for making a railway through the estate to Prince Town." The purchaser sought specific performance. Jessel M.R. held that the reservation was void for uncertainty and refused specific performance. He said: "By the contract the vendor agrees to sell certain land, but 'reserves the necessary land for making a railway through the estate to Prince Town.' If the conveyance were executed in this form, it is obvious, according to the present law, the whole land would

(1) 11 Beav. 497; 2 H. & T. 327, 331. (2) L. R. 20 Eq. 492, 493.
(3) [1902] 2 Ch. 523.

pass to the purchaser, the reservation being void for uncertainty. But this is not the intention of the parties, for the vendor intended to reserve a substantial part of the estate. The contract does not shew what that is. I neither know what is the amount of land necessary for a railway, nor what line the railway is to take, nor anything about it, and, therefore, I cannot enforce specific performance of the contract."

This was an exception from the grant of the land and not a mere reservation of an easement. The vendor agreed to sell an estate with an indefinite part excepted. The contract was wholly unperformed, and Jessel M.R. said it was incapable of specific performance, according to the intention of the parties.

Savill Brothers, Ld. v. *Bethell* (1) was also a case of an exception, and, when carefully considered, it is material on this point. In 1896 the vendors conveyed the blue land to a purchaser, Times, in fee simple "save and except and reserving unto the vendors a piece of land not less than forty feet in width commencing at the level crossing over the railway at the point marked A on the said plan and terminating at the nearest road to be made by the purchaser or his assignee on the estate so as to give access to such road from" other lands of the vendors. The exact position of the excepted strip was not defined in any way. The blue land was conveyed subject to a restrictive covenant not to carry on a public-house. The pink land was at the same time conveyed to the plaintiffs with the benefit of this restrictive covenant. In 1898 the vendors purported to convey the forty feet strip, which by that time had become defined, to the defendant, who commenced erecting a public-house on it. The plaintiffs brought an action to enforce the restrictive covenant, contending that the exception of the indefinite strip was invalid altogether, and the entire blue land passed to Times and was bound by the covenant. They said: "It is not a reservation, but an exception, and it is void for uncertainty."

There Buckley J. says: "The question wholly turns on this in my view. The deed of March 23, 1896, recites the covenant not to carry on this trade upon any part of the

(1) [1902] 2 Ch. 523, 529, 530, 531, 540.

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'hereditaments intended to be hereby conveyed'; and the covenant is that the trade shall not be carried on upon any part of the said 'hereditaments hereby conveyed.' The question, therefore, is whether there is excepted from the deed, so that it is not thereby conveyed, the piece of land upon which Bethell is now erecting a public-house." That was the forty feet strip. "It is said that in this case the exception is void upon two grounds. First, that it is uncertain because one cannot tell what is excepted; and, secondly, that it infringes the rule as to perpetuities. Let me point out in what respects the exception is uncertain."

After holding that the exception was uncertain and referring to the conflict in the older authorities as to whether it could be rendered certain by a subsequent election, Buckley J. proceeds thus: "In that state of the law I think I am entitled to guide myself by some more recent authorities, and in the first place I will refer to a passage in Lord Watson's judgment in the case of *Cooper* v. *Stuart* (1), where, delivering the judgment of the Privy Council, his Lordship said this: 'An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately, and the subject of it does not pass to the grantee.'" That is the end of the quotation. Then Buckley J. says: "I cannot read that sentence as consistent with the view that there can be an exception which does not operate immediately, because until a subsequent event you cannot ascertain either the dimensions or the situation of the thing excepted. In other words, I read that as not being consistent with the view of the law that it may by subsequent election be determined what is properly the subject of an exception." It will be observed that he is there dealing with an exception strictly so called. Then he says farther: "It has been said that I may treat it, as in the case of *Cooper* v. *Stuart* (1), as being not a true exception, but a reservation in the sense that it may be treated as a defeasance or shifting use, as a grant to Times, the grantee, until the road is selected, and then to the vendors. It appears to me I cannot

(1) (1889) 14 App. Cas. 286, 289.

treat it in that way. In *Cooper* v. *Stuart* (1) the word was 'reserving,' and in this case the words are 'save and except and reserving.' The difference is well known between the two. An exception is a taking out, a subtraction from, that which has been previously expressed to be granted of some part of the thing granted. A reservation must be of some new thing out of that which is granted. Here both words are used—'save and except and reserving.' I must, therefore, treat this as being an exception from the thing which is granted." Then he adds this: "I ought to add that I have been asked to determine another question that might arise between the parties, namely, whether any effect could be given to this clause by way of reserving an easement to the vendors of a right of way over the land which has been granted to the purchaser. On that I say nothing at all. Even if it did take that form, the soil would equally pass to the purchaser and would be bound by the covenant." From his decision there was an appeal, and Stirling L.J. delivered the reserved judgment of the Court, which determined that the conveyance in that case operated at common law and not under the Statute of Uses. The judgment says: "It has long been settled that, according to the common law, a limitation of an estate of freehold to commence in futuro is void. . . . . If, then (as we think), the conveyance of March 23, 1896, operates at common law, the exception is bad." That is to say, if there were an immediate estate, not an estate to begin in futuro, but immediately, as would be the case if it operated at common law, the exception being thus indefinite would be bad. Then it was suggested that the deed might operate under the Statute of Uses, and that there might be a shifting use, and that at the time the use sprang up the land would be defined, and therefore the objection that the exception was too indefinite would be got rid of. The Lord Justice proceeds to point out that then there would be another fatal objection to it, because the shifting use would not arise necessarily within the period allowed by the rule against perpetuities:— "If, however, it can be held that the conveyance operates under the Statute of Uses, then it appears to us that the exception is equally bad as infringing the rule against

(1) 14 App. Cas. 286, 289.

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perpetuities; for the election, without which the exception is of no effect, need not be made, according to the terms of the conveyance, until after the 'nearest road' had been made by the purchaser or his assignee—an event which would not necessarily occur within the period prescribed by the rule. It was contended that, according to the law as stated in Sheppard's Touchstone, the election must be made in the lifetime of both grantor and grantee; but the answer is that, although this might be so if the deed had been silent on the subject, the parties have chosen to determine otherwise. On this part of the case the reasoning of Sir George Jessel M.R. in *London and South Western Ry. Co.* v. *Gomm* (1) appears to be in point."

Now down to that point Stirling L.J. had been treating it as an exception, and not a reservation, and pointing out that it was invalid either for one reason or another. If the deed operated at common law it was void for uncertainty, if it operated under the Statute of Uses it was void for perpetuity. Then there was obviously a suggestion that an easement had been reserved to the vendors, the same point that Buckley J. had been asked to deal with. On that point Stirling L.J. says: "We do not thereby decide that effect cannot in some other way be given to the intention, which is plain on the face of the deed, that the vendors should be entitled to access from their lands on the east side of the railway to the roads which the purchaser proposed to make on the west side." The point as to the reservation of an easement was not decided at all. Both those cases, so strongly relied upon by the plaintiffs, were cases of exception from a grant. This is the reservation of an easement.

The second point was that the provision was void for perpetuity according to *London and South Western Ry. Co.* v. *Gomm.* (1) But the conveyance reserves an immediate right or easement of tunnelling. It is not a right to arise at some future time, it is an immediate right. The conveyance was made subject to a legal reservation of the easement. That is not like *Gomm's Case* (1), where the covenant was to reconvey on the happening of a future event which might not arise within the period of time allowed by the rule against perpetuities. Moreover, in *Gomm's*

(1) 20 Ch. D. 562, 580.

Case (1), as the covenant had not been entered into by Gomm, who was only an assignee of the covenantor, it was essential for the railway company to maintain that the covenant bound and therefore created an interest in the land. Jessel M.R. pointed this out and said that if it was a mere personal contract it would not be obnoxious to the rule against perpetuities, but, as Gomm had not himself entered into the covenant, it was essential for the plaintiff to prove that it ran with the land in order to succeed against the assignee.

In the present case the plaintiffs themselves entered into the contract to grant and granted the easement of tunnelling, and they are the very parties who now wish to restrain the defendants from exercising that easement. There is no question here as to the validity of the grant of an easement in futuro. There was an immediate right to make the tunnel directly the conveyance was executed, and the plaintiffs accepted the conveyance subject to that right. Again I wholly fail to appreciate why the plaintiffs are not bound by their own personal contract, which has nothing whatever to do with the rule against perpetuities.

Thirdly it was said that the plaintiffs had no legal right to grant the easement having regard to cases like *Mulliner* v. *Midland Ry. Co.* (2)—that is to say, having purchased the land for the purpose of their railway, they could not grant to somebody else the easement of tunnelling under it. There is nothing whatever in that point. In *In re Gonty and Manchester, Sheffield, and Lincolnshire Ry. Co.* (3) it was decided by the Court of Appeal that the company could grant an easement, in that case a right of way, if it was not inconsistent with the purposes for which the lands were taken by the railway company. Here the existence of the tunnel will not prejudice the railway company the least in the world. It is merely part of the accommodation works agreed upon.

Fourthly I think that the present matter is directly within s. 71 of the Railways Clauses Consolidation Act, 1845. That section provides that "If any of the owners or occupiers of lands

(1) 20 Ch. D. 562, 580. (2) 11 Ch. D. 611.
(3) [1896] 2 Q. B. 439.

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affected by such railway shall consider the accommodation works made by the company, or directed by such justices to be made by the company, insufficient for the commodious use of their respective lands, it shall be lawful for any such owner or occupier, at any time, at his own expense, to make such further works for that purpose as he shall think necessary, and as shall be agreed to by the company, or, in case of difference, as shall be authorised by two justices." Here the landowners are proposing at their own expense to make the tunnel they think necessary. The company have agreed that they shall make it, and the agreement is before me. The plaintiffs say they do not agree to it now; but, having agreed and received valuable consideration therefor, they cannot afterwards turn round and retract their agreement.

Fifthly it was said that the defendants are not the heirs, appointees, or assigns of the original vendor. In my opinion they certainly are. William Montague Calcraft, the son, succeeded to the land with all the rights, powers, and privileges of his father, John Hales Calcraft, and by the lease of September 30, 1884, he made the lessees his assigns for the purpose of the construction of the tunnel, as it is manifest that the provision at the end of the lease refers and can only refer to the right of tunnelling conferred by the agreement of May 31, 1847. On November 1, 1900, that lease was assigned to the defendants. It was said, as I gather, that no one could be the assign of that right who was not the assign of the whole of the land held by the vendor. I do not accept that at all. The vendor could have made the tunnel at any point he pleased and could assign the same right to the purchaser or lessee of any portion of the land. Of course there can only be one tunnel, and having once assigned the right to the defendants' predecessors, he could not assign it to any one else unless the defendants released their right. [After mentioning a further point that had been cleared up by the evidence, and an alternative defence that in the circumstances it was unnecessary to consider, His Lordship continued:—] In my opinion the defendants have a legal right to make the tunnel, and the plaintiffs' action fails.

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The plaintiffs appealed. The appeal was heard on November 5, 1909.

Micklem, K.C., and *Percy Wheeler*, for the plaintiffs. The agreement of May 31, 1847, purports to create an easement over land to arise at a future time. The agreement confers an interest in land, and as it fixes no limit of time within which the right to tunnel must be exercised, it is void as contravening the rule against perpetuities: *London and South Western Ry. Co.* v. *Gomm.* (1)

[FARWELL L.J. The Court there decided that the original covenantor might have been made liable. This is a personal contract which was never attached to the land.]

It was intended to be a limitation of the land.

[COZENS-HARDY M.R. referred to *Borland's Trustee* v. *Steel Brothers & Co., Ld.* (2) and *Walsh* v. *Secretary of State for India.* (3)]

The defendants are claiming upon this land to impose a fetter of indefinite duration and of complete uncertainty, and that they are not entitled to do: *Edwards* v. *Edwards.* (4)

The claim is the same whether it is made against the original covenantor or against persons claiming under him. It is really a claim against the land. The question whether an easement is covered by the rule against perpetuities has never been decided, but in Lewis on Perpetuities, pp. 619, 620, it is submitted that the rule applies to easements.

[FARWELL L.J. I see no reason to doubt the accuracy of that passage in the case of a right against real estate, but it has nothing to do with a personal covenant.]

In so far as the defendants claim specific performance they are claiming an interest in the actual land itself. This differs from the cases on restrictive covenants by reason of the undefined nature of the right conferred by this agreement. Further, the defendants are not assigns. This is an agreement attached to the whole of the land and cannot be detached so as to run with a particular part of it.

(1) 20 Ch. D. 562.
(2) [1901] 1 Ch. 279, 289.
(3) (1863) 10 H. L. C. 367.
(4) [1909] A. C. 275, 277.

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Hon. E. C. Macnaghten, K.C., MacSwinney, and *H. O'Hagan*, for the defendants, were not called upon.

COZENS-HARDY M.R. My very high respect for Mr. Micklem and Mr. Wheeler does not prevent me from saying that I entirely fail to appreciate the relevancy of the greater part of the arguments which we have heard in this case. It is a case in which the only point that has been argued before us seems to me to be reasonably clear. In 1847 the railway company wanted to acquire, pursuant to their parliamentary powers, some land in Kent which divided the estate of Mr. Calcraft. It is a chalk neighbourhood, and I will assume in favour of the railway company, but of course without deciding it, that under the conveyance which they obtained from Mr. Calcraft chalk was not an excepted mineral, but that the underlying chalk passed to and is now vested in the railway company. It was obvious that in a transaction of that kind various arrangements were absolutely necessary for the accommodation of the severed land, and that in the absence of such arrangements the compensation payable by the company to Mr. Calcraft would have been assessed at a figure far beyond that at which it was assessed. The compensation was left to a gentleman to ascertain, but by this agreement made between the railway company and Mr. Calcraft by his agent certain obligations were entered into by the railway company with Mr. Calcraft. [His Lordship read the agreement and continued:—] That was an agreement entered into by the railway company —if I may use such a phrase of a corporation, a living covenantor, a covenantor now alive. Let me suppose that Mr. Calcraft was alive. What possible objection would there have been to an action by Mr. Calcraft against the actual covenantor? What would the rule against perpetuities have to say to the matter? I have listened with some amazement to the contention that the rule of perpetuities applies where the action is brought, not against an assign of the covenantor, but against the covenantor himself, and I have listened with still more amazement when I heard the case of *London and South Western Ry. Co.* v. *Gomm* (1) cited as an authority for that purpose. Now it is

(1) 20 Ch. D. 562.

well to make clear what that case was. There the London and South Western Railway Company sold some land which they believed to be surplus land to Powell, and the conveyance contained this covenant by Powell: "And Powell for himself, his heirs, executors, administrators, and assigns, covenanted with the plaintiffs, their successors and assigns, that he, the said G. Powell, his heirs and assigns, owner and owners for the time being of the hereditaments intended to be thereby conveyed, and all other persons who should or might be interested therein, should and would at any time thereafter (whenever the said land might be required for the railway or works of the company) whenever thereunto requested by the company, their successors or assigns, by a six calendar months' previous notice in writing reconvey" the property for 100*l*. Powell assigned to Gomm, and the London and South Western Railway Company in this action, which was brought against Gomm and not against Powell, sought to enforce that covenant against Gomm, who was not the covenantor, who could not be made liable upon the covenant unless it was a covenant which ran with the land so that the burden of it passed with the land, and it was held by the Court of Appeal that the action failed. But so far from that being an authority in favour of the proposition which has been argued, it is, as I read it, as clear and distinct an authority as could be desired to the contrary. Kay J., from whom the appeal was brought, says (1): "A contract to buy or sell land and covenants restricting the use of land, though unlimited, are not void for perpetuity." That means as between the contracting parties, and Sir George Jessel (2) expressly draws the distinction in these words: "If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell, who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land." And Lindley L.J. says (3): "How is Gomm to be held bound by this covenant? He did not enter

(1) 20 Ch. D. 576. (2) 20 Ch. D. 580.
(3) 20 Ch. D. 588.

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into it, he is not bound at law." So far from that being an authority that Powell would not have been bound by the covenant, and that the London and South Western Railway Company could not have enforced the covenant against Powell, I think the observations of all the members of the Court plainly indicate that in that case there would have been a perfectly enforceable covenant by Powell at the instance of the London and South Western Railway Company, and the whole doctrine of the rule against perpetuities would have had absolutely nothing to do with it. So that, if Mr. Calcraft were now alive, I think there could be no answer to an action by him against his living covenantor claiming to enforce the rights under the covenant in the agreement of 1847.

Then the next point is this. It may be said, supposing that to be so, supposing Calcraft might have sued upon this covenant, Calcraft is dead and gone long ago, and it must be for the present defendants to make out that they are entitled to the benefit of the covenant as assignees of the covenant. That I think they do make out with ease and with perfect satisfaction. Calcraft died in 1879. His son was his universal successor. Both his real and his personal estate were vested in him. He being in that position granted a lease in 1884 to the predecessors of the defendants for a long term of years of a portion of the chalk on each side of the railway not extending the whole length of the land subject to the agreement of 1847, and at the end of the habendum there is this proviso: "And it is hereby agreed and declared that during the continuance of this demise the rights and privileges and liabilities of the lessor under and by virtue of" not the conveyance of 1847, be it observed, but the agreement of May, 1847, which I have referred to, "a copy whereof is indorsed upon these presents, shall be vested in the lessees." How after that it can be said that the defendants as successors of the lessee are not entitled to say, with regard to the benefit of this agreement which is indorsed on the lease and which is expressly said to be vested in them, that they are assignees of the covenant and entitled in the character of such assignees of the covenant to sue the living covenantor, really is altogether beyond me. It seems to me when one gets to the bottom of this

case it is a very plain one. A living covenantor has covenanted with A. B. and his assigns, and the defendants are the assignees of that covenant, and they simply ask that they may be entitled to claim the benefit and to enforce the benefit of that covenant for the purpose of connecting the two portions of the demised chalk which are separated by the railway and which they desire to join by means of a tunnel. I should add that no tunnel has yet been made pursuant to this agreement. No greater burden is imposed upon the railway company by this. Only one tunnel could be made, and it seems to me that the view taken by the learned judge is perfectly right and that the rule against perpetuities has nothing whatever to do with it, and that the present defendants are the assignees of the covenant quoad the demised property. In that demised property they desire to make the tunnel, and I can see no reason why as against the covenantors, with whom alone we are concerned, they should not enforce their rights.

The appeal will be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. I do not think that in my whole experience I have ever had to decide upon a more utterly unmeritorious claim than that which is put before us by the appellants here. In 1847 the plaintiffs, the South Eastern Railway Company, were anxious to buy a strip of land for the purpose of their railway. It is quite clear from the documents before us that the effect of this purchase would be to cut in two the land of the person from whom they were purchasing, and that the severance claims must have amounted to a very large sum of money. They were claims that could be largely diminished by accommodation works, because the damage was damage which was purely due to severance. Moreover it related to the future and would not become present and actual damage until the land had been worked to a considerable extent. They therefore made an agreement whereby some slight accommodation works were made on the surface, and the railway company undertook to allow one tunnel to be made underneath the surface when the time should arise when it became necessary; but it was provided that it should be so made as not to affect

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the railway and to be to the satisfaction of the company's engineer. I have not the slightest doubt that such an agreement most gravely affected the price that the railway company paid for the land. Severance claims in the case of land which, as in the present case, was going to be used for the purpose of excavating chalk (which I will assume is a material that passes to the railway company under the ordinary conveyance) are difficult to assess. They must largely be matter of conjecture. Accordingly in compensation cases they are assessed at very high values because the person from whom the land is taken has no option but to sell it and can only claim compensation at that moment, and thus the difficulty of assessing future damage is forced upon him. It is not of his seeking, and as he has a right to be fully protected, the arbitrators generally take a liberal view of the amount of his claim. Having thus obtained the land for a considerably less sum than they otherwise would have had to pay by reason of their having entered into this eminently sensible agreement, the railway company, now that the time has arisen and that the person who is entitled to the benefit of this agreement wishes to make the tunnel, repudiate their agreement. And to do them justice, there is no hypocrisy in it. They do not pretend that they do it on public grounds, but they do it because they think they can get either 70*l.* or 75*l.* a year as the price of what they promised to give as part of the consideration of the purchase. They think themselves justified in repudiating an agreement of which they have had the benefit because in this way they will reap a pecuniary advantage. If they were right in law, the fact that I am thoroughly disgusted with the railway company for putting forward such a claim would not affect me in the slightest. The importance of making English law clear and certain is so immeasurably greater than any other consideration—it is the one thing that we are here to do—that I should have decided in their favour if they were in my opinion right in law; but in this case the law on which the claim is founded seems to be as bad as the morals. The company made a personal agreement that they would allow something to be done. They are bound by that agreement because, as the Master of the Rolls said, personal covenants do not fall within any

rule of perpetuities, and they are the actual covenantors. Therefore I cannot see a shadow of justification for the claim they set up. If the other party to the agreement were alive, they would be bound by a covenant which they entered into with him. It is true he is dead, but to my mind on the most elementary principles of law the benefit of this covenant passed as part of his estate to the residuary legatee, and it has been assigned by him to the defendants in this case, and they are, for the purposes of to-day, in exactly the same position as the original Mr. Calcraft himself.

On these grounds I am of opinion that the railway company are bound by their agreement.

FARWELL L.J. I am of the same opinion. It is settled beyond argument that an agreement merely personal not creating any interest in land is not within the rule against perpetuities. It is sufficient to refer to *Witham* v. *Vane* (1), in the House of Lords. There there was "a covenant by a purchaser of lands in fee simple contained in the conveyance made to him by the vendor, that the purchaser, his heirs, appointees, and assigns, will from time to time and at all times pay, or cause to be paid, to the vendor, his heirs, executors, administrators, or assigns, the sum of sixpence for every chaldron of coals wrought and gotten out of the lands conveyed, and which shall be shipped for sale." That was entered into by the Earl of Darlington (afterwards Duke of Cleveland) in 1824. He died in 1842; the benefit of the covenant was assigned to certain other persons, and they sued the executors of the Duke in the year 1883, and this question of perpetuity was swept aside as having no relevancy whatever to a mere personal covenant, although such covenant was connected in some way at any rate with the land. But the fact that there is some connection with or reference to land does not make a personal contract by A. less a personal contract binding on him, with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both; he may have attempted

(1) (1883) Challis on Real Property, 2nd ed., App. V., p. 401.

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both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant.

The real answer to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land to which the covenant relates. If he has still that land, then in an action on the covenant the plaintiff may claim specific performance, and it is for the Court to see whether in such circumstances it is inequitable to grant specific performance, or whether the covenantor ought to pay damages in lieu of it. There is no defence to such an action in the present case. So far as I see I should have no hesitation whatever in decreeing specific performance. There certainly is no honesty in the company's case; there is a clear covenant by them to do a certain thing when called on by a particular person. They are so called on by that person. They have had the benefit of the covenant in the reduction of the amount of money which they have had to pay, and now they refuse to perform their own personal covenant on the ground of perpetuity.

Solicitors: *John W. Watkin; Leonard & Pilditch.*

H. B. H.

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[1908 W. 1339.]

Local Government—Compulsory Purchase—Widening Street—Notice to Treat—Withdrawal—Compensation—Michael Angelo Taylor's Act, 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 80.

Where a landowner has been served with a notice to treat under the compulsory powers of Michael Angelo Taylor's Act, he must either treat the notice as good or repudiate it as a whole; he cannot accept it in part and repudiate it in part.

Where a landowner has declined to accept or has repudiated the validity of a notice to treat, the local authority is entitled to withdraw it altogether, and cannot be compelled to proceed with that part of it which is acceptable to the landowner.

In such a case no compensation by way of damages will be given to the landowner.

Decision of Eve J., [1909] 2 Ch. 287, affirmed.

Appeal from a decision of Eve J. (1)

The question raised by this appeal was whether under the circumstances the Woolwich Borough Council could withdraw certain notices to treat which they had served on the plaintiffs under Michael Angelo Taylor's Act for the purpose of widening certain streets within their borough, and, if so, whether the plaintiffs were entitled to compensation for all costs, charges and expenses, loss and damage incurred as a consequence of the service of such notices.

The notices to treat, facts, and correspondence between the plaintiffs and the town clerk of the council are given at length in the report of the case in the Court below, and the following summary is considered sufficient for the purposes of this report.

On May 10, 1906, the council, in pursuance of their powers under Michael Angelo Taylor's Act, served a notice to treat upon the plaintiffs for the purchase of so much of the frontages of certain houses in Artillery Place, Woolwich (shewn upon a plan), "as projected into, obstructed, and prevented the council from widening the said street."

The plaintiffs, who were trustees of the property included in this notice and freehold reversioners of part of it, objected to

(1) [1909] 2 Ch. 287.

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this notice on the ground that it would leave them only a useless strip of land, and required the whole of the houses to be taken; a correspondence followed, and ultimately the council agreed to purchase the whole of the houses, but declined to proceed with the purchase of the leasehold interests, intending to wait until the leases fell in.

The plaintiffs thereupon intimated their intention of taking proceedings against the council to restrain them by injunction from adopting this method under their notice to treat. The matter, however, remained in abeyance till September, 1907, when a meeting took place between the town clerk and the plaintiffs, with the result that two fresh notices to treat under Michael Angelo Taylor's Act were served.

Both notices were dated October 9, 1907, the first being for the purchase of the whole of the houses in Artillery Place and the land in the rear, and not merely the strip of frontage included in the notice of May 10, 1906, and the second notice being for two additional cottages.

These notices were also objected to by the plaintiffs in a letter of January 9, 1908, on the ground that they included more property than was necessary for the proposed street widening, and also because the council were not acquiring the leasehold interests, but they intimated that they were prepared to treat the notices as valid upon two conditions—(1.) that the amount of land taken to the west of a named spot should be limited to a defined strip, and (2.) that the council should acquire the leasehold interests, and that, if assurances were not given on these points, application would be made to the Court for an injunction to restrain the council from proceeding with these notices except on the terms mentioned.

On January 24, 1908, the council withdrew their notices of October 9, 1907.

The plaintiffs thereupon commenced this action against the council, claiming (inter alia) a declaration that it was not competent for the defendant council, without the plaintiffs' consent, to withdraw the notices to treat of October 9, 1907, as regards the land in Artillery Place; that, even if it were competent, such withdrawal revived the notice of May 10, 1906, which was

capable of being proceeded with; and, further, that in any event the defendant council were not entitled to withdraw any of their notices without making full compensation to the plaintiffs for all costs, charges and expenses, loss and damage incurred in consequence of the service of such notices.

Eve J. held that it was open to the council to withdraw their notices, and that there was no ground for awarding compensation.

The plaintiffs appealed.

Macmorran, K.C., Jessel, K.C., and *R. J. Quin*, for the appellants. The judgment under appeal does not correctly interpret the nature of the original obligation imposed by the notice to treat under Michael Angelo Taylor's Act, s. 80, and the subsequent ss. 81 and 82. The council had no power to take more than was required for the proposed widening, but if what projects into the street is practically the whole house, or what is taken would leave the rest of the house useless, then we can require them to take the whole: *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1); *Gibbon* v. *Paddington Vestry.* (2) We say that these notices of October 9, 1907, are good in respect of so much as the council had a right to take, but bad as to the rest. The whole notice to treat was not invalidated by the council being told that more land was being taken than was required for the widening. [They referred to the forms of injunction in Seton on Judgments, 6th ed. p. 701, and *Sparrow* v. *Oxford, Worcester, and Wolverhampton Ry. Co.* (3)]

There is no power to withdraw a notice to treat, assuming it was good so far as the frontages are concerned. But if there is a power to withdraw, it can only be done subject to putting the persons affected in the same position as if no such notice had been served. The notice can only be abandoned subject to the consequence of any damage or injury that may have been caused, such as driving tenants away, &c.: *King* v. *Wycombe Ry. Co.* (4) That an owner may be entitled to compensation appears from Romer L.J.'s observations in *Davis* v. *Witney*

(1) [1894] 2 Q. B. 742.
(2) [1900] 2 Ch. 794.
(3) (1851) 9 Hare, 436, 438.
(4) (1860) 29 L. J. (Ch.) 462, 465.

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Urban Council. (1) The notice to treat binds the land in the hands of the owner, and the plaintiffs have been deprived of the opportunity they otherwise might have had of letting. Damage has been suffered as the result of these notices, for which compensation should be given.

P. O. Lawrence, K.C., C. A. Russell, K.C., and *H. Courthope-Munroe*, for the defendant council, were not called upon.

COZENS-HARDY M.R., after stating the nature of the appeal, continued:—I entirely agree with the judgment of Eve J., and for the reasons assigned by him, and I am not sure that I need say much more.

A notice to treat under Michael Angelo Taylor's Act does not in substance differ from a notice to treat under the Lands Clauses Consolidation Act; in either case it defines the land to be taken, and if a notice to treat is given which the landowner objects to and declines to accept, and he says he will take proceedings to restrain the authority from acting upon it, it seems to me quite clear, on principles of general law, that it is competent for the local authority to say, "You tell me this is bad; you tell me that you will take proceedings to restrain me from going on with it; very well, then, I withdraw it." It seems to me, on general principles of law, that is a proposition which must be sound. The analogy of the two Acts may not be strictly close, but I think it is so near that it is worth commenting upon. Under s. 92 of the Lands Clauses Consolidation Act, when a railway company have given notice to treat for part of a house or manufactory, the landowner may give a counter-notice, calling upon the railway company to take the whole, and, if such counter-notice is given, then it is competent to the railway company to withdraw from their original notice to treat and leave the parties just as they were. In other words, a landowner cannot require the railway company to take the whole of the house, but he can say, "If you take any part you must take the whole." There is no provision in Michael Angelo Taylor's Act for a counter-notice, but there is that which in the result is very much the same: the right of the local authority is only to

(1) (1899) 15 Times L. R. 275, 276.

take so much of a house or land as is required for the widening of the street; and the Courts have taken this view, that a local authority cannot by a notice to treat say, "We will take the part of the house which alone projects into the street, and we will leave you, the landowner, with a few walls, which are not, and cannot really be, capable of being made a house, or what we can regard as a house." The true view of such a case is that it is the house which obstructs the street, and it is the house concerning which the notice to treat may be given. Stirling J. in the case of *Gibbon* v. *Paddington Vestry* (1) took that view. He actually granted an injunction restraining the authority from proceeding under a notice to treat to take part of the building, on the ground, which he made quite clear, that in a case like that it was the house as a whole which must be held to have obstructed the road, and that the notice to treat as to part was bad. That seems to me clearly to assert, not merely to imply, that in cases like that, if the local authority wants to widen the street, it must serve a new notice to treat, claiming the right to take the whole of the house.

I do not propose to go through the notices to treat which were given here. It seems to me that the first notice was plainly a notice which was not one under which the authority could have been required to take the section of the house which was not within the line shewn on the plan, and I think it is perfectly clear that that notice was really abandoned by mutual consent. Then came the other notices, and it suffices to say that there was a formal objection to the authority proceeding with them, and a threat that an action would be commenced claiming an injunction to restrain them from proceeding with those notices. Then the local authority said, "We withdraw." Why should they not? I have not heard a single argument to justify any other than one answer to that. It is quite true that the authority which gives a notice to treat cannot withdraw it against the will of the other side, and before acceptance, but when once the other side have said, "We will not have it; we will commence proceedings against you to restrain you from acting upon it," it seems to me quite hopeless to contend that it is not open to the local authority

(1) [1900] 2 Ch. 794.

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in those circumstances to say, "Then we withdraw what you object to." That, in short, is what Eve J. has decided, and that seems to me to be perfectly sound law, and, moreover, perfectly good sense; and I think that is all I need say about that part of the case.

With regard to the claim for compensation, I feel a difficulty in treating that with gravity. There is not a particle of authority for such a claim, nor can I see any foundation in principle for it. The notices were either originally bad or were desired to be treated as bad, and if the plaintiffs did abstain from developing their land as they otherwise might, they did it with the full knowledge of all the circumstances, and I can conceive no legal proposition known to our law which entitles the plaintiffs to compensation for such a loss as they have sustained. In my opinion this appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion, both for the reasons given by Eve J. and for those given in the judgment of the Master of the Rolls.

The only special point is that this is a case under Michael Angelo Taylor's Act, which was passed in 1817. It represents therefore an early form of machinery for compulsory purchase. It makes use of a notice to treat and a valuation by a jury on that notice to treat. There is one fundamental principle which rules all such cases, and that is that the land which the jury have to value is that shewn and specified in the notice to treat and none other. It is quite true that in subsequent Acts there are sections, like s. 92 of the Lands Clauses Consolidation Act, which in some cases authorize the persons possessing lands to give a counter-notice to the public authority, requiring them to take the whole of a house or tenement of which by the notice to treat they only propose to take part. The consequences of that counter-notice have been settled in many cases. There is no such provision in Michael Angelo Taylor's Act, and no case has suggested that in all cases of compensation there is impliedly a power to give any counter-notice which shall have any legal consequences. But two cases, *Gordon* v. *Vestry of St. Mary*

Abbotts, Kensington (1), and *Gibbon* v. *Paddington Vestry* (2) (in my opinion on very good grounds), have decided that where a house causes an obstruction to a street the true view may be that the street is obstructed by the house, and not by merely a portion of the house; that the Act contemplates in such cases purchasing the whole house and not merely that part of the house which physically interferes with the intended street; and that, therefore, the public authority which intends to use the powers of Michael Angelo Taylor's Act ought to realize in its notice to treat that if it wants to send its street through a portion of the ground actually occupied by the house its duty is, excepting in certain special cases, to treat the whole house as the obstruction, and to give notice to purchase the whole. Those cases do not give the slightest countenance to the idea that any land can be taken under a notice to treat excepting that which is shewn and specified therein. On the contrary, the latter of the two cases, which was a decision of Stirling J., actually restrained the public authority from going on under a notice to treat which purported only to take part of certain houses, because that notice to treat ought to have proposed to take the whole of them. As soon as this is clearly understood it becomes obvious that the case of the plaintiffs in this action cannot possibly be supported.

With regard to the question of some implied right to compensation for costs or damages done by reason of this notice to treat, I quite agree with the Master of the Rolls that it is scarcely possible to treat it with gravity.

Farwell L.J. I am of the same opinion.

The actual relief, apart from declarations, asked for in this action is specific performance of a contract alleged to be contained in divers notices and letters which do not amount to anything approaching a contract. A contract requires two parties to be ad idem as to the subject-matter and the price. A notice to treat settles definitely the subject-matter; as Lord Fitzgerald puts it in *Tiverton and North Devon Ry. Co.* v. *Loosemore* (3), "The notice to treat having been given, it fixed

(1) [1894] 2 Q. B. 742. (2) [1900] 2 Ch. 794.
(3) (1884) 9 App. Cas. 480, 515.

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the land to be taken, leaving only the price to be ascertained." The only fixing of the land by the notices to treat has in each case been repudiated by the plaintiffs. In each case they gave notice to the defendants that if they proceeded they (the plaintiffs) would take proceedings against the council to restrain them by injunction; and again in January, 1908, they gave the council notice that if they persisted in going on with the second notice to treat the plaintiffs would proceed to apply for an injunction to restrain them from so doing. Therefore, so far as the plaintiffs are concerned, the only contract the initial portion of which, namely, the notice to treat, emanates from the council, has been absolutely rejected and repudiated by them. There is not a scrap of evidence of any other contract. The council, having received those threats, were at perfect liberty to say, "There is an end of the matter; we do not wish to take anything other than that which we have specified in the notice to treat, and the only injunction you could get would be one to restrain us from acting on our notice to treat, and, rather than put you to that trouble, we will give it up"; and, in my opinion, there is an end of the whole matter. I can see no ground whatever for asking the Court to remodel the notice to treat, and it is entirely beyond the jurisdiction of this Court so to do. We do not make contracts; we enforce them when they are proved. The result is that the learned judge was perfectly right.

The only shadow of a ground for the other proposition put forward by the appellants is the extract from the *Law Journal* report of *King* v. *Wycombe Ry. Co.* (1), in which I think there has been some slip. At any rate in Beavan's report (2), which, I believe, was corrected by the learned Master of the Rolls, those words do not appear or were struck out. It is perfectly clear that if there was no contract there can be no damages for breach of contract, and any claim to compensation is out of the question.

Solicitors: *Wadeson & Malleson; A. B. Bryceson.*

(1) 29 L. J. (Ch.) 465. (2) 28 Beav. 104.

W. C. D.

In re NICHOLS' AND VON JOEL'S CONTRACT.

C. A. 1909 Nov. 11.

[1909 N. 335.]

Vendor and Purchaser—Title—Forcing Doubtful Title—Difficult Question of Construction—Procedure—Vendor and Purchaser Summons—Originating Summons—Costs.

Where a vendor's title to land depends upon a question of construction involving real difficulty the proper mode of getting that question determined is by originating summons and not by a vendor and purchaser summons, and if the vendor insists upon proceeding by vendor and purchaser summons it is competent to the Court to declare the title too doubtful to force upon a purchaser.

An agreement was made for the sale of freehold ground rents, the title to which depended upon the construction of an obscure will. The purchaser having objected to the title, the vendors took out a vendor and purchaser summons for the purpose of getting the question of construction determined. Neville J. offered to adjourn the case to enable the vendors to take out an originating summons, and, on the refusal of this offer, held that the title was too doubtful to force upon the purchaser. The vendors appealed, and on the appeal the Court made the same offer, which was accepted. Upon the originating summons the question of construction was decided in favour of the vendors, and on the adjourned hearing of the appeal it was declared that the vendors had shewn a good title, and the order of Neville J. was discharged on the subsequent matter:—

Held, that the vendors ought to pay the costs of the appeal and in the Court below.

Appeal from a decision of Neville J. upon a vendor and purchaser summons.

By a contract of sale dated January 26, 1909, John B. B. Nichols, Walter B. Nichols, Isabel Lindley, the Honourable Walter B. Lindley, and the said John B. B. Nichols and Walter B. Nichols agreed to sell and Henry von Joel agreed to purchase certain freehold messuages now known as Nos. 88 to 102 (even numbers), Churchfield Road, West Acton, but formerly known as Nos. 1 to 8, The Parade, Acton, subject to the leases affecting the same, at the price of 1804*l.*

The three first-named vendors derived title under the will of Robert Cradock Nichols, dated January 5, 1888, the three last-named vendors being made parties to the contract as trustees of

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the marriage settlement of Isabel Lindley, whose share in the property in question was subject to a covenant contained in the marriage settlement to settle after-acquired property.

The testator by his said will, after making certain specific and pecuniary bequests, devised and bequeathed all the residue of his real and personal estate to his wife, Emily Mary Nichols, for life, and after her death, in the event of the testator having any children, among such children as therein mentioned. The testator then proceeded as follows: "And if there shall be no such child or children then I devise and bequeath upon the death of my said wife to the following persons if then living or if any of them have then deceased leaving children then among such children in equal shares the following that is to say:—" Then followed certain specific gifts, and the will then proceeded: "To my niece Irene Nichols my eight freehold houses Nos. 1 to 8 The Parade Acton Middlesex and also the sum of 2000*l.* To my niece Isabel Lindley my six freehold houses Nos. 1, 2, 3, 4, 5, 7 Newburgh Road Acton aforesaid and also the sum of 2000*l.* To my nephews Robert Victor Elvey and Charles Greville Elvey as joint tenants all the remainder of my freehold estates at Acton aforesaid" (then followed certain other specific gifts) "And the rest of the said residue as my dear wife may by will appoint to and among the children of my brother Francis Morgan Nichols."

The testator made a codicil to his will not material to be stated, and he died on May 26, 1892, without issue.

On December 20, 1893, the testator's widow married Henry Faure Walker. Irene Nichols died a spinster in the lifetime of Mrs. Faure Walker, namely, on January 19, 1907.

By her will, dated October 22, 1902, Mrs. Faure Walker appointed the residue of the estate of her late husband in manner therein mentioned, and by a codicil dated March 19, 1907, she revoked the appointment made by her will and appointed the said residuary estate equally between John B. B. Nichols, Walter B. Nichols, and Isabel Lindley, all of whom were children of the testator's brother Francis Morgan Nichols.

The testatrix died on November 26, 1907.

The purchaser objected to the title and suggested that the property in question did not pass to the testator's widow under the devise "of the rest of the said residue," but passed either to the heir-at-law or under the devise to the testator's nephews Robert Victor Elvey and Charles Greville Elvey of all the remainder of the testator's freehold estates at Acton.

The vendors then took out a summons under the Vendor and Purchaser Act, 1874, for a declaration that under the will of the testator and in the events which happened the property comprised in the contract for sale passed under the gift in the will of "the rest of the said residue," and that the vendors had shewn a good title in accordance with the contract.

Neville J. at the hearing of the summons suggested that the proper course was for the vendors to take out an originating summons to determine the question of construction, and offered to allow the vendor and purchaser summons to stand over for that purpose, but the vendors declined to adopt that course. The learned judge then held that the title was too doubtful to be forced upon the purchaser and dismissed the summons with costs.

The vendors appealed.

The appeal originally came on for hearing on June 23, 1909.

After the appeal had been opened the Court of Appeal made the same offer as was made by Neville J. The vendors accepted this offer and took out an originating summons. The originating summons was heard by Neville J., who declared that the property passed under the gift of "the rest of the said residue."

The appeal now came on again for hearing.

Potts, for the appellants. The appellants have succeeded upon the construction of the will and have shewn a good title, and, although they do not claim any costs, as successful appellants they ought not to be called upon to pay costs.

Rolt, for the respondents. All the costs have been incurred by reason of the appellants having adopted and persisted in a wrong mode of procedure. A vendor is not entitled by

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proceeding by way of a vendor and purchaser summons to obtain a decision upon a difficult question of construction at the expense of the purchaser.

The decision appealed from was quite right upon the facts before the learned judge at the time. The appellants ought therefore to pay the costs here and below.

Potts in reply.

COZENS-HARDY M.R. I should be very sorry to have it supposed that it is my view that upon a vendor and purchaser summons it is not the habit and duty of the Court in ordinary cases to construe a will or document forming part of the title, but I also think it is quite plain that when there is real difficulty or doubt in construing a will, and when there is, according to the rules of the Court, a very easy mode in which that construction can be determined in such a manner as to bind everybody, it is not right for the Court to force a title upon a purchaser which merely may mean that he is buying a lawsuit. The old rule that some titles are so doubtful that they ought not to be forced upon a purchaser is still in force, and in some degree ought to be more readily adopted than it was under the old law because of the existing cheap and rapid mode in which questions of construction can be determined. Here the vendors said they had a good title; the purchaser objected that they had not. The vendors might have obtained a decision upon the construction of the will which would have bound everybody, but they preferred to take out a vendor and purchaser summons, the result of which would be to get the will construed at the expense of the purchaser. Neville J. took the view that this was not a matter which ought to be decided simply as between vendor and purchaser. He said, "There is a real point of difficulty and I will not decide it one way or the other. I offer you an opportunity of taking out a construction summons." That offer was refused. The only thing that Neville J. decided was that this was a case in which he ought not to enforce this title when there was an easy mode of settling the doubt in favour of the vendors. As I have said, the offer was refused. An appeal was lodged, and it was opened here, the will was read, and Mr. Potts, I have no

doubt, stated his point very clearly and ably. Without pretending to remember what occurred then, I seem then to have said that I had not formed an opinion one way or the other upon the point, but that it was a question which ought to be decided upon a construction summons so as to bind everybody. In short, I took the same view that Neville J. took. We offered to allow the appeal to stand over to enable the appellants to take out a construction summons. That was an offer which Mr. Potts was not bound to accept, but he did accept it. If he had not accepted it, this Court might have taken a view adverse to the appellants' title, and although that might have been a decision only as between vendor and purchaser, it would have been such a blot upon the title as would have made the property practically unsaleable. He accepted the offer; the construction summons was taken out and was heard by Neville J., who has decided in favour of the vendors. The only question then is what we should do. It is quite clear that this, which is a matter subsequent, changes the position, and I think that we ought, in the order that we now propose to make, to enter the order on the construction summons which declares that this particular property passed under the residue, and then I think we should declare that the vendors have a good title and discharge the order of Neville J.; but this matter subsequent ought not in any way to interfere with the costs. I think that the vendors were wrong in the proceedings they took below and that they were wrong in the appeal which they brought here—or at least we cannot say that they were not wrong—and that they must pay the costs both here and below.

FLETCHER MOULTON L.J. I am of the same opinion and have nothing to add.

FARWELL L.J. The Master of the Rolls has pointed out the greater facility there is now than there formerly was in getting a decision upon a question of construction. The vendor knows his own title; the purchaser does not. The vendor who knows of a doubt cast on his title by the construction of some will or document can protect himself against it by conditions

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and take the risk of such conditions depreciating the value of his property and reducing the purchase-money; or he may cheaply and quickly obtain a judicial opinion on the title which will bind all the parties brought before the Court and then sell his property with the benefit or burden of such decision. But if he does not choose to adopt either of these courses, but sells and takes his chance of the purchaser objecting to his title, the Court may fairly say (as Neville J. has said in the present case) that it is not fair on the purchaser to make him pay the costs of clearing the vendor's title, if there is a real question to be determined, nor is it expedient to waste time and money in deciding a point in which other persons are interested who are not before the Court and who will therefore not be bound by the decision.

Solicitors: *Corbould, Rigby & Co.; Oldfields.*

H. B. H.

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ATTORNEY-GENERAL *v.* BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD.

[1899 A. 844.]

Local Sanitary Authority — Natural Stream — Pollution — Sewage Works — Injunction — Discharge of Injunction on subsequent Facts — Statutory Offence by Public Body — Remedy — Right of Attorney-General to Injunction — Discretion — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 17.

The only prohibition contained in s. 17 of the Public Health Act, 1875 (so far as regards natural streams), is against conveying into any natural stream such sewage or filthy water as will prejudicially affect the purity of the stream. Therefore where sewage or other filthy water is conveyed into an already polluted stream no offence is committed against the section unless the stream is thereby made fouler than it was before.

Kekewich J. having granted, at the instance of the Attorney-General, a perpetual injunction to restrain a public drainage board from discharging sewage water into a river in contravention of s. 17 of the Public Health Act, 1875, the defendants appealed; but upon the appeal they did not contest that the injunction was properly granted on the facts existing at the trial. The defendants, however, obtained successive adjournments of the appeal to enable them to complete certain sewage works upon which they were engaged in order to comply with the section. The works having been completed at an enormous

cost, and there being a conflict of evidence as to their sufficiency, the Court referred the matter to an expert to report, and he reported in favour of the defendants.

In these circumstances, it appearing that there was no longer any breach of the section, and the defendants undertaking to use their best endeavours to prevent any future breach, the Court discharged the injunction, the appellants to pay the costs of the appeal.

The Attorney-General, complaining that a public body is committing an offence against a statute, is not entitled as a matter of right, on proving his case, to an injunction.

Dicta of Farwell J. in *Attorney-General* v. *Wimbledon House Estate Co.*, [1904] 2 Ch. 34, 42, and of Vaughan Williams L.J. in *Attorney-General* v. *London and North Western Ry. Co.*, [1900] 1 K. B. 78, 87, approved.

Dictum of Kekewich J. overruled.

APPEAL from a decision of Kekewich J. (1)

The action was brought under s. 17 of the Public Health Act, 1875, by the Attorney-General at the relation of the Corporation of Tamworth and the Tamworth Rural District Council against the Birmingham, Tame, and Rea District Drainage Board for an injunction to restrain the defendants from making or using any sewer, drain, or outfall in or about their sewage farm, known as the Birmingham Sewage Farm, at Saltley, in the city of Birmingham, for the purpose of conveying and from conveying sewage or filthy water into the river Tame until such sewage or filthy water was freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in the said river.

The river Tame passed through Birmingham, and it was a polluted and sluggish stream when it reached the defendants' sewage farm.

The defendants were a joint board established under s. 279 of the Public Health Act, 1875, for the purpose of treating the sewage of the city of Birmingham and various other sanitary districts.

The action was tried in October and November, 1907. The learned judge was satisfied upon the evidence that the defendants had done their best to discharge the duties imposed upon them by the Legislature, but he found as a fact that they conveyed into the river Tame, by the discharge of lagoon water

(1) [1908] 2 Ch. 551.

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and otherwise, water not freed from excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in the river, and he granted an injunction as claimed.

The defendants appealed.

The appellants did not contend at the bar that the injunction was not properly granted on the facts before the learned judge, but they asked for time to enable them to complete some very extensive sewage works upon which they were engaged with a view of complying with the requirements of s. 17 of the Public Health Act, 1875, and the appeal stood over from time to time for this purpose.

At the date of the trial the method of treating the sewage adopted by the defendants was partly by passing it over bacteria beds and partly by downward filtration in lagoons, but since the judgment this latter method had been abandoned, and the works upon which the defendants were engaged involved the construction of a large storm-water basin or stand-by tank and of a large number of new bacteria beds. The cost of these works was stated to be more than 500,000*l*. After the completion of the works the appeal again came on for hearing, when there was a conflict of expert evidence as to their sufficiency as regards the purification of the sewage, and ultimately the Court of Appeal appointed Sir William Ramsay, Professor of Chemistry at University College, London, to inquire and report to the Court whether the sewage effluents from the defendants' works which entered the river Tame were before entering the said river entirely or to any extent freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity of the water in such river (1.) at the points of entry or (2.) within a distance of 600 yards therefrom.

Sir William Ramsay in his report, after referring to the terms of the reference, said: "If 'excrementitious matter' means actual excrement, whether fæces or urine, then of course my reply is that it is absent. But if it means partly or wholly oxidized fæces or urine the reply must be that there is some present. This definition would apply, though in a much less degree, to the

water drunk by the greater part of the population of London, which is drawn from the Thames and the Lea, and these rivers are polluted by large volumes of sewage effluent from the towns on their banks. It is needless to say that the sewage undergoes careful purification before it enters the rivers, and also that the water is further purified by storage in reservoirs and filtration through sand to such an extent that no danger is to be anticipated from drinking it. Dismissing these theoretical views as hardly applicable, it seems to me that the real question to be decided is, Are the waters of the Tame and the Rea before they receive the effluent from the Birmingham Sewage Works purer or less pure than after the effluent has been added?" Then, after stating the results of the analyses which he had made of various samples of the river taken above and below the entry of the effluent, he concluded as follows: "To sum up: my opinion is that the river is not made fouler by the Birmingham effluent. To adopt the terms of reference: the sewage effluents from the defendants' works which enter the river Tame are to such an extent freed from excrementitious matter and other foul or noxious matters that they do not affect or deteriorate the 'purity' of the water in such river (1.) at the points of entry or (2.) within a distance of 600 yards therefrom."

The appeal now came on for hearing upon the consideration of this report.

Sir R. B. Finlay, K.C. (with him *P. O. Lawrence, K.C.*, and *T. T. Methold*), for the appellants. The report of the referee is entirely in the appellants' favour. Since the trial the whole system of drainage has been changed and new works have been constructed at an enormous cost; and in these circumstances it is not right that a public body which has been doing its best throughout to discharge its duties should be compelled to go on working under the stigma of an injunction. We therefore ask the Court to discharge the injunction.

[FARWELL L.J. Can you find any precedent for that?]

No, but the facts are unprecedented.

This is analogous to a case in which an injunction is sought to restrain a nuisance and the nuisance has been abated

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immediately after writ issued; in such a case the Court would not grant an injunction.

Macmorran, K.C., and *Stewart-Smith, K.C.* (with them *J. Henderson*), for the respondents. Kekewich J. took the view that so long as a local authority discharged an impure thing into a river which was more impure the section was not infringed. We contest that. We say that the intention of the Legislature was to prohibit the discharge of any polluting liquid into any natural stream. Jessel M.R. in dealing with s. 4 of the Local Government Act Amendment Act, 1861, from which s. 17 of the Public Health Act, 1875, is copied, says the meaning is "you shall not send your sewage water into a natural stream until you have made it wholesome water—until you have got rid of all the noxious matter in it": *Attorney-General* v. *Cockermouth Local Board.* (1) There is no precedent for discharging or suspending an injunction in circumstances like these. [They also criticized the report and contended that it afforded no satisfactory answer to the respondents' claim.]

Sir R. B. Finlay, K.C., in reply, referred to *Attorney-General* v. *Wimbledon House Estate Co.* (2) and *Attorney-General* v. *London and North Western Ry. Co.* (3)

COZENS-HARDY M.R. This is undoubtedly a case of great importance not merely to the particular locality, but, I think, to all local authorities throughout the country. The Birmingham District Drainage Board have statutory powers to deal with the sewage of Birmingham and a large tract of land, including several very important towns. They constructed sewage works, but those sewage works did not fully carry out the intentions of those who had constructed them, and it is plain—I do not wish to throw any doubt upon it—that whatever be the true meaning and effect of s. 17 of the Public Health Act, 1875, the defendants in this case were guilty of a breach of that section. The action having been commenced in 1899 and having stood over from time to time in order that the defendants might see what could be done, it came on for trial before Kekewich J. in 1907. He

(1) (1874) L. R. 18 Eq. 172, 177. (2) [1904] 2 Ch. 34, 42.
(3) [1900] 1 K. B. 78, 87.

decided, and I see no reason whatever to doubt the accuracy of his decision, that there was then a breach of s. 17, and he granted an injunction in the terms of that section and ordered the defendants to pay the costs of the action.

Before I deal with the rest of the case, there is one part of the judgment of Kekewich J. to which I am not prepared to give assent. He says (1): "As I understand the law, the Attorney-General, coming to complain that a public body is exceeding its powers, or committing some offence against a statute, is entitled as a matter of right, on proving his case, to the only relief which the Court can grant, namely, an injunction in one form or another." I am not prepared to assent to that proposition. I think the view which was taken by Farwell L.J. when a judge of first instance in *Attorney-General* v. *Wimbledon House Estate Co.* (2) and by Vaughan Williams L.J. in *Attorney-General* v. *London and North Western Ry. Co.* (3) is the more accurate one, and that it is not the law that the Attorney-General is entitled as a matter of right to say, "In all circumstances, if I prove a breach of a statute, the Court is bound to grant an injunction, whether it be an injunction against continuing to do something, or whether it be in the form of a mandatory injunction."

Then it falls to us to consider what has happened since. The defendants appealed against the judgment of Kekewich J., but at the bar they did not dispute the accuracy of his judgment. In substance they proceeded on this footing: they say, "We are not really in a position to contend that Kekewich J. was wrong in granting this perpetual injunction, but since the judgment, at an enormous expenditure of money, we have so altered the situation that there is now no breach of s. 17." The evidence was most conflicting. The deponents on the one side said that, so far from there being any pollution, the river was improved. The deponents on the other side said, "That is really quite absurd: go and look just below the exit of your water, and you cannot fail to see sewage fungus." We said, when this was before us in June, This is a case in which the Court must have the assistance of an expert of the highest

(1) [1908] 2 Ch. 562. (2) [1904] 2 Ch. 34, 42.
(3) [1900] 1 K. B. 78, 87.

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qualifications and of the highest position, who will go to the locus in quo and who will see what is being done, attended at least once by representatives on each side, and who will give us the benefit of his assistance. We named Sir William Ramsay, of whose qualifications it would be impertinent of me to say a word, and he was requested "to inquire and report to the Court whether the sewage effluents from the defendants' works which enter the river Tame are before entering the said river entirely or to any extent freed from all excrementitious matter or other foul or noxious matters such as will affect or deteriorate the purity of the water in such river (1.) at the points of entry or (2.) within a distance of 600 yards therefrom." Now Sir William Ramsay has been good enough to furnish us with a most elaborate and careful report. I do not propose to go through it. Suffice it to say that he has analysed with the greatest care a large number of specimens of the water taken at the various points where the effluents enter the river and within 600 yards further down, and the conclusion at which he arrives in his report I will repeat in his own words: "To sum up: my opinion is that the river is not made fouler by the entry of the Birmingham effluent. To adopt the terms of the reference: the sewage effluents from the defendants' works which enter the river Tame are to such an extent freed from excrementitious matter and other foul and noxious matters that they do not affect or deteriorate the 'purity' of the water in such river (1.) at the points of entry or (2.) within a distance of 600 yards therefrom." If the construction of s. 17 is that which the learned judge thought it was, and which for the reasons I am about to give I think it is, that, of course, is a clear and explicit finding that there is now at this moment nothing done by the defendants in contravention of that section.

It is quite true that that report is not absolutely binding upon us; it is open to criticism by counsel, as it has been criticized by Mr. Macmorran; but to suppose that we should not have regard to a report by a man of that eminence in a case in which, apart from that report, the evidence was absolutely contradictory is, I think, impossible. I therefore have no hesitation in saying that, whatever the result of our subsequent decision may be, I

accept as a fact those findings which Sir W. Ramsay has made in the two sentences which I have read.

Well, but is that sufficient? Sect. 17 says this: "Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such stream pond or lake." Now is that an absolute prohibition against conveying any filthy water into any natural stream, or is it only a prohibition against conveying filthy or sewage water in such a manner as to prejudicially affect or deteriorate? I will read what Kekewich J. said upon this point. After reading the words of the section, he says (1): "This again necessarily implies that excrementitious or other foul or noxious matter may be conveyed, for it is not said that none such shall be conveyed into any natural stream or watercourse, but only that there shall not be conveyed into it such as would affect or deteriorate the purity and quality of the water. It seems to me that, on the grammatical and reasonable interpretation of the language, what the Legislature intended to prohibit was the deterioration, that is, the making worse the purity and quality of the stream or watercourse, and that no one can be said to have offended against the prohibition if as a matter of fact there has been no such deterioration." It seems to me hardly reasonable to say that a man can be guilty of a statutory offence under this section if he has improved the water by that which he casts into it. I think, therefore, that the question which we submitted to Sir William Ramsay was the proper question to submit in a case like this, and that it is not true to say that there has been a statutory offence if the defendants have put into the river some water which does contain a certain amount of filth, although it is so much better than the rest of the water which was in it before that upon the whole it improves the character of the water. In other words, it cannot be said to deteriorate the purity of the water; on the contrary, it benefits it, and we must read

(1) [1908] 2 Ch. 555.

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the word "affect" in the sense of prejudicially affect or deteriorate the purity and quality of the water.

That being so, what ought we to do in this case? I cannot fail to regard this: that the defendants are a public body discharging a most important function, that they have spared no money,—we are told that upwards of 500,000*l.* has been spent over these works,—and that they have done the best they could, with the result that instead of damnifying they have benefited the river. In these circumstances is it right to say that this body should go on discharging their duties with a sword over their heads in the shape of a perpetual injunction? I think not. It may be that in the order which we propose to make we are going beyond anything that has been done in any previous case which is reported, but I think that the order which we propose will, while removing the sword over the heads of the defendants, and while enabling them to discharge their duties without the prejudice created by such an injunction, impose upon them such obligations as the statute desires should be imposed upon them and will give to the plaintiffs all such rights as they ought to have. The order will be in this form: It appearing that the state of things existing at the date of the judgment has since been changed by means of the permanent works constructed by the defendants so that there is no longer any breach of the statutory provisions contained in s. 17 of the Public Health Act, 1875, and the defendants undertaking to use their best endeavours to prevent in future any breach of such provisions, discharge the injunction. The appellants to pay the costs of the appeal.

FLETCHER MOULTON L.J. I am of the same opinion, and I agree that this case raises a point of great importance to local authorities and to the public generally. The difficulty of dealing with sewage, now that our towns have grown so large, is very great, and, seeing that sewage is now nearly all waterborne and that it must therefore go down natural channels to the sea, the terms and restrictions which have been put by the Legislature upon the discharge of sewage into these natural streams become questions of great importance, and it is incumbent on the Courts to see that they do not make the remedies which are in

their hands for compelling these bodies to do their duty in this respect too onerous, by pushing beyond their legitimate meaning the legislative provisions as to purity; otherwise the task of the sanitary authorities would be made impossible to perform. I think s. 17 of the Public Health Act, 1875, evidences that the Legislature has felt the great difficulty of the task, and it has taken a standard for performance which is on the one hand sufficient to protect the public, but is on the other hand a practical standard, which leaves the task of the local authorities a possible one.

Before I deal with the words of the section I wish to deal with the question of what is excrementitious or other foul or noxious matter. We all know that excrementitious matter, being of organic origin, is liable to change, and, as Sir William Ramsay has put it, if we are to take excrementitious matter to mean unchanged fæces or urine, then the defendants do not offend, because in their effluent there is none such. But to give it that meaning would, in my opinion, be to make the section not sufficiently stringent to protect the public, because these organic bodies rapidly undergo change, chiefly in the way of oxidation, which makes them approach more and more nearly to definite chemical bodies of a stable character, such as are generally met with in what is called inorganic chemistry. Therefore what is present is more or less completely oxidized or burnt up excrementitious matter. If we were to say, therefore, that the statute meant that everything that had an excrementitious origin remained, no matter what changes supervened, excrementitious matter still, it would be perfectly impossible to purify water that had once been used as sewage, because the processes of purification do not remove the nitrogen and the oxygen and the carbon which existed in the excrementitious matter that was originally put into the water; they only change their combinations. That which was put into the water must substantially remain there, and would remain there all the time. Consequently you cannot say that, because there is matter which is derived from excrement, there is therefore excrementitious matter present. That would be a ludicrous interpretation of the section. The Legislature, therefore, realizing that that

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which is put in the water remains there in some form, except some very minute portion which may become volatile, such as free ammonia—and even that would remain in the water in small traces—and seeing that it must remain there, feels itself obliged to give some practical definition of the duty of the local authorities in dealing with their sewage which is not based upon the idea that you take out that which is put in. It must be sufficient that it is so changed by subsequent chemical change that it becomes harmless from the point of view of the public and does no damage to them. The test they have taken is an excellent one. They have said you may not discharge into a stream that which makes it worse. The consequence is that, if by carefully applying purifying processes to the upper waters of the stream those waters become more and more pure, then those that discharge into the lower waters of that stream must improve their methods so that they do not interfere with that improvement. Nobody may make a stream worse by discharging water into it that has received excrementitious matter. The language of the Act seems to me not to possess any ambiguity. [His Lordship read the section.] What you must not do is to discharge into the stream water which will make it worse. That being the meaning of the section, it seems to me that after this report of Sir William Ramsay, which, knowing well his eminence, I accept absolutely, we must come to the conclusion that the defendants no longer offend against this section. He says quite plainly that if excrementitious matter means actual excrement, whether fæces or urine, then of course it is absent. That is an interpretation of the section which, as I have said, we cannot adopt. It is too narrow. Then he goes on to consider the presence of those more or less stable bodies which are formed by chemical processes from the crude sewage and which grade up from things almost as unstable as the original fæces to things as stable as nitrates, and by well-known tests he examines the condition of the water just before you come to the sewage works and also after the whole of the effluent has been put in. He finds in general a most remarkable state of things with regard to the effluent. It is fully oxidized, much better oxidized than the water into which it is put, and he comes to this conclusion—that the

effluent does not deteriorate the stream; in fact, it rather improves it. He points to the existence of green growth in the river, and gives abundant reasons for his coming to the above conclusion, but it is the conclusion which is really important to us, and therefore I am satisfied that at last the admitted zeal of the defendants and their desire to perform their statutory duties have led them, thanks to improvements in modern science, to a successful result, and that therefore the offence against this section has ceased. The question of storm-water has by admission gone. That being so, I think that it is not right for this Court to leave a public body which is conscious of its duties and which has for years been striving to its utmost to perform its duties perfectly (as is found by the learned judge in the Court below) under the stigma of an injunction. I think it is not right for us to leave them under that stigma when we are satisfied that it has at last succeeded, and is using means which will in the future be successful, merely because it took a very long time to enable it to perform the gigantic task imposed upon it, and I thoroughly agree that, whether it be novel or not, it is the duty of the Court in a case like the present to make such an order as that which the Master of the Rolls has proposed, and that it has ample power to do so.

Farwell L.J. I am of the same opinion. On the question of construction it appears to me that Mr. Macmorran's argument assumes the absolute purity of all streams, watercourses, canals, ponds, or lakes, an assumption to which I cannot assent. I read the section as meaning that it shall not affect such purity as the stream may have, not the absolute purity which the stream is assumed to have. The other point on which I desire to say something is the question which Kekewich J. has disposed of at p. 562, where he came to the conclusion that he had no discretion and was bound to grant an injunction because the Attorney-General asked for it. In my opinion that is a misconception. An injunction is only one of the forms of remedy which the Court grants in aid of a legal right. The right of the Attorney-General is to intervene and to call the attention of the Court to a breach of the statute. Of course in such an action there is no

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remedy in damages possible, but there is a remedy by declaration, as well as by injunction, and such injunction if granted may be suspended, or, in lieu of an injunction, liberty may be given to apply. The right to an injunction is certainly not absolute. It is put by Lord Kingsdown in *Imperial Gas Light and Coke Co.* v. *Broadbent* (1) thus. He says: "The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that, unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation." The reference to special circumstances shews that it is in the power of the Court to say whether it will grant an injunction or whether it will not. When one bears in mind, as Sir George Jessel said in *Attorney-General* v. *Cockermouth Local Board* (2), that there is no difference between an ex officio information and an information at the relation of a private individual—in both cases the Sovereign as parens patriæ sues by the Attorney-General—it is startling to be told that it is sufficient for the Attorney-General to institute proceedings alleging a breach of the statute and that there is an end of the matter. It is for the Court to say, acting as His Majesty's judges, whether an injunction is the proper remedy. I do not think there is any authority which justifies the conclusion to which Kekewich J. came on this point. My observations in *Attorney-General* v. *Wimbledon House Estate Co.* (3) were only obiter. In that case the Attorney-General intervened at the relation of a public authority, complaining of a breach of a building line, and the defendants declined to do anything at all. The question whether the Attorney-General could be guilty of laches was argued before me, and I did not think it was necessary for me to express any opinion on that point. Then I say this: "It is not sufficient for the Attorney-General simply to come to the Court and say, 'I call attention to the fact that there has been a breach of this statute, and it follows as a matter of course that the mandatory

(1) (1859) 7 H. L C. 600, 612. (2) L. R. 18 Eq. 176.
(3) [1904] 2 Ch. 34, 42.

injunction which I ask for must be granted.'" I adhere to that, and I would leave out the word "mandatory," because I think the observation applies both to a mandatory injunction and to a negative injunction. Lord Halsbury in *London County Council* v. *Attorney-General* (1), when he is stating that the Court has no jurisdiction to restrain the Attorney-General from giving his fiat, says this: "It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not." Of course that is perfectly accurate. It is for the Attorney-General to determine whether he should commence litigation, but it is for the Court to determine what the result of that litigation shall be. This is well put by Fry J. in *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (2), where he says: "The question is whether, under such circumstances, the Attorney-General is justified in interfering, though there is no evidence of actual injury to the public. In my judgment he is entitled to do so, and the Court is bound to attend to his interference." That is to say, the Court cannot say: "You ought never to have instituted these proceedings": it must listen to his application, and then adjudicate whether there should be an injunction granted or not. On that point the conclusion of Kekewich J. was based, in my opinion, on a misapprehension.

Now comes the third point, as to our jurisdiction to intervene in the way which the Master of the Rolls has proposed, and with which I entirely agree. I think that this Court has authority to make such an order as it considers that the judge of first instance ought to have made under the circumstances of the case; the learned judge could have made a mere declaration and have

(1) [1902] A. C. 165, 168. (2) (1882) 21 Ch. D. 752, 755.

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let the question of the injunction stand over; and although such a matter is within his discretion, it is a judicial discretion which we might in a proper case review, though we should be unwilling to do so readily. Or, again, he could have granted the injunction but suspended its operation, and then, having found that the works had been absolutely completed, so that the whole nuisance was removed, he could have suspended it in toto. Those matters come before us with the same jurisdiction which the learned judge had, and I cannot doubt but that the learned judge could have said: "I will not grant an injunction, but I will merely make a declaration." I cannot doubt that he had jurisdiction to say: "I will suspend the injunction for a time, or I will grant no injunction, but will accept an undertaking in lieu of an injunction," and the form of the undertaking may be different from the injunction asked for. All those courses are as open to us as to the Court below, and I see no reason why we should not, in a case like the present, where it is obviously beneficial to all parties, make this alteration in the judgment in the terms which have been already stated. It certainly does no harm to the plaintiffs, because it avoids the cumbrous and unsatisfactory motion for a writ of sequestration, in which the applicant is hampered by the fact that he has to prove wilful disobedience to the order, and substitutes a simple undertaking; but at any rate I see no reason why we should not accede to the request of the defendants, who say, "There is now no case for an injunction; we have done our best; we never intended to be disobedient to any order of the Court; we have done a great service to the public as well as to the plaintiffs, because we have experimented in a way which will be useful to all other public bodies." I think that there is no difficulty as to our jurisdiction to make the order, and I think it is right to do so.

Macmorran, K.C. Then there will be liberty to us to apply.

COZENS-HARDY M.R. That goes without saying, but you may have it inserted in the order if you like.

Solicitors: *Sharpe, Pritchard & Co., for E. V. Hiley, Birmingham; Braikenridge & Edwards, for Nevill & Matthews, Tamworth.*

H. B. H.

In re COXWELL'S TRUSTS. KINLOCH-COOKE *v.* PUBLIC TRUSTEE.

JOYCE J.
1909
Nov. 3.

[1909 C. 1445.]

Revenue—Estate Duty—Settled Fund—Special Power—Appointment of specified Amounts—Of the "clear" Amount or Value—Residue of Fund—Incidence—Will—Construction.

By his will, made in 1883, the donee of a special power of appointment over a settled trust fund directed that certain portions of the fund "of the clear amount or value," and, subsequently, "of the like amount or value," therein specified should be appropriated and retained upon the trusts therein declared in favour of certain objects of the power, and that the residue of the fund should be appropriated and retained upon trust for another object. The donee died in 1906:—

Held, that the words "of the clear amount or value" and "of the like amount or value" exempted from estate duty the portions of the fund in respect of which those words were used, and that such duty must be borne by the residue of the fund.

In re Currie, (1888) 57 L. J. (Ch.) 743; 36 W. R. 752, and *In re Saunders*, [1898] 1 Ch. 17, applied.

ADJOURNED SUMMONS.

The testator, in exercise of a special power of appointment in favour of the issue of the marriage contained in his marriage settlement, by his will, made on November 30, 1883, appointed that from and after his death the trust moneys, stocks, funds, and securities then comprised in and subject to the trusts of the marriage settlement should be held upon trust that the settlement trustees "shall appropriate such portion of the said trust premises as shall at my death be of the clear amount or value of 4500*l.* sterling and retain the same to answer the trusts hereinafter declared for the benefit of my daughter the said Mary Emma Cresswell and shall appropriate such further portions of the same trust premises as shall at my death be respectively of the like amount or value of 4500*l.* each and retain one of such portions to answer the trusts respectively hereinafter declared for the benefit of each of my unmarried daughters the said Annie Coxwell Susan Coxwell and Emma Maria Coxwell and shall raise out of the same trust premises the sum of 2250*l.* sterling and pay the same to my youngest son the said Charles Fillingham

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Coxwell and shall appropriate such further portions of the said trust premises as shall at my death be of the like amount or value of 2250*l.* and retain the same to answer the trusts hereinafter declared for the benefit of my last named son and shall raise out of the same trust premises the sum of 2500*l.* sterling and pay the same to my daughter the said Charlotte Mainwaring or in the event of her predeceasing me then to my granddaughter Marie Gwendolen Mainwaring in case she shall survive me and live to attain the age of twenty-one years or marry under that age and shall appropriate such further portion of the said trust premises as shall at my death be of the clear amount or value of 2500*l.* sterling and retain the same to answer the trusts hereinafter declared for the benefit of my daughter the said Phœbe Cresswell and shall appropriate and retain the residue of the said trust premises to answer the trusts hereinafter declared for the benefit of my eldest son the said John Edward Grenfield Coxwell."

And the testator in the case of each of his four daughters directed the trustees to stand possessed " of the said sum of 4500*l.* or the stocks funds or securities of that amount or value hereinbefore directed to be appropriated and retained for the benefit of " such daughter upon the usual trusts of a settled share, and also referred in similar words to the sums of 2250*l.* appointed to his youngest son and of 2500*l.* appointed to his daughter Phœbe and declared similar trusts concerning the same respectively. He also declared trusts of the residue of the fund.

The testator made three codicils to his will, all dated in 1905, but in none of them did he confirm his will.

The testator died on July 31, 1906.

This was a summons by the surviving trustee of the residue of the settled funds comprised in the settlement against the Public Trustee, who jointly with the plaintiff was trustee of the appropriated funds, and against the persons beneficially interested in the residue of the settled funds, for the determination of the question whether all or any of the specified sums appointed by the will ought to be appropriated and retained or raised and paid (as the case might be) without any deduction in respect of duties, costs, charges, and expenses, and, if so, whether the residue of the settled funds must bear the same.

H. S. Howard, for the plaintiff, stated the facts.

Owen Thompson, for the defendant the Public Trustee. There is no question that, as between the appointed fund and the residue under the will, the appointed fund bears its own duty. I submit that where part of a fund is appointed that part may be said to be charged on the fund—*In re Countess of Orford* (1)—and that the direction that it is to be "of the clear amount or value" is a "provision to the contrary" within the meaning of s. 14, sub-s. 1, of the Finance Act, 1894, and that therefore the specified part appointed does not bear its own duty.

The word "clear" shews that the portions which are to be appropriated are to be clear net sums, and that the residue of the appointed fund must bear both its own duty and also the duty on the appointed parts. The appointees take the specified portions free from any costs or duty: *In re Currie* (2); *In re Croft* (3); *In re Countess of Orford* (1); *In re Saunders* (4); *In re Maryon-Wilson* (5); and per Kekewich J. in *In re Chisholm*. (6)

[JOYCE J. At the date of the will, would not succession duty have been payable on this fund?]

Yes. That is in my favour, for this is one of the cases in which estate duty has superseded succession duty, and if the testator intended the portions to be free of succession duty they ought to be free of estate duty.

Where the words "like amount or value" are used, I submit that they refer and are equivalent to "clear amount or value," and that the portions so appointed are also exempt from the incidence of estate duty. There are no words to exempt the sums directed to be raised and paid.

Borthwick, for the defendants interested in the residue of the appointed fund. The general rule is that the appointment of the residue under a special power is just as specific as the appointment of the specified parts, and the duty is borne rateably by all: *In re Chisholm* (6); *In re Saunders*. (4) So that, prima facie, each share would bear its own proportion of the duty and

(1) [1896] 1 Ch. 257.
(2) 57 L. J. (Ch.) 743; 36 W. R. 752.
(3) [1892] 1 Ch. 652.
(4) [1898] 1 Ch. 17.
(5) [1900] 1 Ch. 565.
(6) [1902] 1 Ch. 457, 462.

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costs, and to displace the application of the ordinary rule here would lead to a most whimsical result. The testator cannot have intended that some children should have their appointed shares free of duty and others not.

In re Currie (1) was the case of a general power, so that there it was really the case of a legacy, and the difference between the case of a legacy and of an appointed fund is pointed out by Lindley M.R. in *In re Saunders.* (2)

I submit that "clear" refers to the duty of the trustees. They are to set aside or raise it clear of any costs of so doing, and once it is set aside or raised it is to be left to the ordinary rules of law applicable. It refers not to what the beneficiaries are to take, but to what the trustees are to do—*In re Saunders* (2); *Banks* v. *Braithwaite* (3)—and each portion and specified sum ought to bear its proper duty.

JOYCE J. This is a question relating to the incidence of estate duty as between the different portions of a fund which was subject to a special power of appointment contained in the testator's marriage settlement.

The testator made a will in 1883 exercising the power, but did not die until 1906, and did not confirm his will by any codicil.

In 1883, when the will exercising the power was made, the Finance Act had not been passed or even thought of, so that there could not have been any question of the Finance Act in the mind of the testator when making his will. But the Succession Duty Act, 1853, was then in force, and under the appointments which the testator made—or whether he had appointed or not—succession duty under that Act would have been payable at his death on the fund in question.

This fund, as I have said, was subject to a special power, and it is settled that such a fund must bear its own estate duty. The general rule is that if specified sums are appointed out of a fund subject to a special power to some one and the rest of the fund appointed to another, then the estate duty must be borne by the sums so appointed and by the residue of the fund

(1) 57 L. J. (Ch.) 743; 36 W. R. 752. (2) [1898] 1 Ch. 17.
(3) (1862) 32 L. J. (Ch.) 35.

rateably according to their value. But this is not the case of a simple appointment of specified sums. Some of the appointments are directions to appropriate such portions of the trust moneys, stocks, funds, and securities subject to the power as shall at the testator's death be "of the clear amount or value of" and "of the like amount or value of" the sums specified, and then the portions so appropriated are settled under the clauses of the will. Later on the testator directs certain specified sums of money to be raised and paid, but without any such expression as "of the clear amount or value."

Now the specified sums so directed to be raised are to be paid to the particular appointees, while the portions which are directed to be appropriated are to be settled upon the testator's daughters and youngest son, and I must say that at first sight it does not occur to me why the testator should wish to make any difference, so far as the manner of the appointment is concerned, between the sums directed to be raised and paid and the portions of the trust moneys, stocks, funds, and securities directed to be appropriated and retained. However that may be, the portions which he has directed to be appropriated are to be "of the clear" or "of the like" amount or value. Those words are emphatic, as was pointed out by Vaughan Williams L.J. in *In re Saunders* (1), and I must give some meaning to them. It may seem a capricious thing for this testator by his appointment to have made the appropriated and settled portions free of estate duty, and to have made the specified sums, which are to be raised and paid, subject to duty, but I cannot help that. I must take what the testator says, and it seems to me that the result of the decision in *In re Saunders* (1) is that the effect of this word "clear" is to exempt the portions so appointed from succession duty which otherwise, but for the Finance Act, would have been payable; and, if that be so, why should not the same word exempt the portions so appointed from estate duty? This case is, in my opinion, really concluded by the decisions in *In re Saunders* (1) and also in *In re Currie* (2), which agrees with it, although in the latter case the power was a general power, but I do not see that that makes any material difference.

(1) [1898] 1 Ch. 17.

(2) 57 L. J. (Ch.) 743; 36 W. R. 752.

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Therefore I hold that when the words "clear amount or value" are used the portion so specified is not subject to the payment of estate duty, which must be paid out of the residue of the fund. That applies also to the portions "of the like amount or value." But where the direction is to raise and pay merely a certain specified sum, then that sum is subject to estate duty.

Solicitors: *Iliffe, Henley & Sweet.*.

R. M.

JOYCE J. 1909 — *Nov.* 16.

MAYOR OF SCARBOROUGH *v.* COOPER.

[1909 S. 1902.]

Municipal Corporation — Corporate Lands — Power to Sell — Consideration — Perpetual Rent-charge—Approval of Local Government Board—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 108, 109.

A municipal corporation has power under the Municipal Corporations Act, 1882, to dispose of its corporate lands, with the approval of the Local Government Board, in consideration of a perpetual yearly chief rent charged upon the lands.

SPECIAL CASE.

The action was brought by the plaintiffs for specific performance of an agreement dated May 11, 1909, for the sale by the plaintiffs to the defendants of certain freehold land being part of the plaintiffs' Weaponness estate, situate in the borough of Scarborough.

The plaintiffs were an ancient corporation and had from time immemorial been seised in fee simple in possession of the Weaponness estate. They were desirous of disposing of portions of the estate for building purposes in fee simple to purchasers in consideration of perpetual yearly chief rents.

By the above-mentioned agreement the plaintiffs agreed to sell and the defendants to purchase a piece of land being a portion of the said Weaponness estate in consideration of a perpetual yearly chief rent of 60*l.* 10*s.* to be created and issuing out of the said land and to be payable by equal half-yearly payments.

The powers of the plaintiff corporation to deal with the said

estate were governed by Part V., ss. 108 and 109, of the Municipal Corporations Act, 1882.

By s. 108, sub-s. 1, it was provided that the council (i.e., the council of the borough) should not, unless authorized by Act of Parliament, sell, mortgage, or alienate any corporate land without the approval of the Treasury.

Sect. 109 was as follows: "The council may, with the approval of the Treasury, dispose of any corporate land either by way of absolute sale, or by way of exchange, mortgage, charge, demise, lease, or otherwise, in such manner and on such terms and conditions as the Treasury approve."

The powers and functions of the Treasury under Part V. of the said Act were by s. 72 of the Local Government Act, 1888, transferred to the Local Government Board.

The Local Government Board had approved of the sale by the corporation upon the terms of the agreement.

The defendants contended that under the provisions of the Municipal Corporations Act above set forth the plaintiff corporation had no power to dispose and the Local Government Board had no right to approve of the disposal by the plaintiff corporation of any portion of the Weaponness estate in consideration of a perpetual yearly chief rent, and suggested that the effect of the said provisions was to empower a municipal corporation to dispose of corporate land in fee simple in consideration of lump sum payments only; and they refused to accept the title.

Under these circumstances this special case was stated under Order xxxiv., r. 1, for the determination of the question whether the plaintiff corporation had power to dispose of the land as provided by the agreement in consideration of a perpetual yearly chief rent.

R. Rowlands, for the plaintiffs. The Local Government Board have consented to similar dispositions by the corporation of portions of this estate and have approved of this agreement, but having regard to the practice which has grown up under s. 175 of the Public Health Act, 1875, they have now begun to doubt whether they have power to approve such sales. A local authority selling under that section can only do so in consideration of a

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lump sum. It is suggested that that applies equally to sales by a corporation of its corporate land under the Municipal Corporations Act, 1882. The words of the two enactments are, however, totally different. At common law a corporation has absolute power to deal with its property in the same way as an individual: *Evan* v. *Avon Corporation* (1); *Riche* v. *Ashbury Railway Carriage Co.* (2); *Colchester Corporation* v. *Lowten.* (3) Restrictions on alienation were first introduced into the Municipal Corporations Act, 1835, s. 94. There is no precise authority upon the point, but *In re Ware* (4) is a decision upon a similar provision in the Lunacy Acts. There a sale was sanctioned although the consideration was not a sum of money to be paid down at once, but a perpetual rent-charge. The only question here is as to the power; there is no doubt as to the benefit of the transaction to the corporation.

The two Acts of 1835 and 1882 have not deprived the corporation of its power of alienation, but have only provided that the power is not to be exercised without the consent of the Local Government Board. It is a provision to ensure the proper exercise by a corporation of its power of alienating its corporate lands.

W. J. Jeeves, for the defendants. The corporation has no power to sell in consideration of a rent-charge and the Local Government Board cannot properly consent to such a sale: *Attorney-General* v. *Aspinall* (5); *Attorney-General* v. *Davey* (6); *Magdalen College, Oxford* v. *Attorney-General.* (7) On the express terms of these enabling sections no such power is given to the corporation as suggested in this case. The defendants are willing purchasers and only desire a good title.

JOYCE J. I do not feel any doubt about this case. The question is whether a municipal corporation, the corporation of Scarborough, has power, with the consent of the Local Government Board, to dispose of some of its real estate—I am told it is

(1) (1860) 29 Beav. 144.
(2) (1874) L. R. 9 Ex. 224, 262.
(3) (1813) 1 V. & B. 226.
(4) [1892] 1 Ch. 344.
(5) (1837) 2 My. & Cr. 613, 623.
(6) (1854) 19 Beav. 521.
(7) (1857) 6 H. L. C. 189.

ancient corporate property—in consideration of the grant of a perpetual yearly rent-charge issuing out of the property. With regard to the question of power, apart from statute ordinary corporations have power to deal with their lands in any way they choose, unless the alienation be inconsistent with any special purpose for which the corporation has been formed, or unless it be a disposition expressly prohibited by statute. As to municipal corporations, restrictions upon alienation were first imposed by the Municipal Corporations Act, 1835. That is now repealed, and the enactments with reference to corporations are consolidated and to be found in the Municipal Corporations Act of 1882. That Act by s. 108 imposed restrictions on the alienation of corporate property without the consent of the Treasury. By s. 109 "The council may, with the approval of the Treasury, dispose of any corporate land either by way of absolute sale, or by way of exchange, mortgage, charge, demise, lease, or otherwise, in such manner and on such terms and conditions as the Treasury approve." Here the corporation propose, in fact they have contracted, to sell or dispose of certain land out and out in consideration of a perpetual yearly rent-charge secured upon it, and that they have done with the approval of the Local Government Board, whose consent has now, by the Local Government Act, 1888, been substituted for that of the Treasury. Therefore, prima facie, it appears to me that what is proposed to be done is authorized by this section. It is said there is no authority on this subject, but by reason of the practice under s. 175 of the Public Health Act, 1875, it has come to be doubted by the officials whether they ought to consent, under the powers given, to such a transaction. But s. 175 of the Public Health Act is quite different. That obviously contemplated a sale for a sum of money in cash. It could not possibly, as it seems to me, apply to such a transaction as this. If authority be needed, however, it appears to me that the decision in *In re Ware* (1) is in point. Sect. 117 of the Lunacy Act, 1890, provides as follows: "The judge may order that any property of the lunatic, whether present or future, be sold, charged, mortgaged, dealt with, or

(1) [1892] 1 Ch. 344.

JOYCE J. 1909 SCARBOROUGH CORPORATION v. COOPER.

disposed of as the judge thinks most expedient for the purpose of raising or securing, or repaying with or without interest, money which is to be or which has been applied to all or any of the purposes following:—" It was there held that the judge had power to authorize the disposition of the lunatic's land in consideration of a perpetual rent-charge. All that was considered was whether the matter was for the benefit of the lunatic or not. That is a decision which is very much in point if authority be needed. I am of opinion that that which is proposed to be done in this case is within the plain words of s. 109 of the Act. The case of *Attorney-General* v. *Davey* (1) is quite different. That was a case in which a charity had no express power to dispose of its lands, and it had to be made out that it was to the advantage of the charity that a lease for 500 years at a fixed rent should be granted. That has really nothing to do with this case. I do not feel any doubt about it.

Solicitors: *Sharpe, Pritchard & Co., for D. A. Nicholl, Town Clerk, Scarborough*; *Radford & Frankland.*

(1) 19 Beav. 521.

G. A. S.

ATTORNEY-GENERAL *v.* BELGRAVE HOSPITAL.

SWINFEN EADY J.

1909

Oct. 29.

[1908 A. 1746.]

Will — Construction — Charity — Legacy "to found a bed in a Hospital" — Endowment.

A testator gave a legacy of 1000*l.* "to the Belgrave Hospital to found a bed there to be called 'the Eleanor bed'":—

Held, that the 1000*l.* must be invested and the income only applied towards maintaining the bed.

Alfred John Randall by his will, dated September 10, 1907, gave all his estate to trustees upon trust for sale and conversion and after payment of debts to pay, among other legacies, "To the Belgrave Hospital for Children at Clapham Road Kennington to found a bed there to be called 'the Eleanor bed' the sum of one thousand pounds such sum to be paid out of such portion of my estate as may be legally employed for that purpose and I direct that the receipt of the treasurer or secretary for the time being of such hospital shall be a good and sufficient discharge to my trustees for the same and I direct that this legacy for the Eleanor bed is to be paid in priority to any of my legacies under this my will."

The testator died on October 22, 1907. The legacy was paid by the testator's executors on February 11, 1908; a cot was selected by one of the executors and duly named according to the testator's wishes by fixing a tablet on the wall over it.

The treasurer of the hospital applied 500*l.*, part of the legacy, in reducing a current account loan due from the hospital to their bankers, and paid the other 500*l.* to their current account.

The hospital was incorporated under the provisions of the Companies Act, 1867, s. 23 (Consolidation Act, 1908, s. 20, sub-s. 1).

The rules of the hospital contained the following provision: "Vice Patrons. Every donor of 1000*l.* may be elected a vice patron, may name a cot in perpetuity, and may have his or her name recorded in some part of the hospital."

The secretary of the hospital gave evidence that the testator called on him early in May, 1907, and they discussed the

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financial position of the hospital and the urgent need for further assistance. The secretary specially called the testator's attention to the overdraft of the hospital upon their current account loan and to the above-mentioned rule giving donors of 1000*l.* the privilege of naming a cot, and the testator then promised that he would leave the hospital 1000*l.* by will.

This action was brought by the Attorney-General at the instance of the Charity Commissioners, asking for a declaration that the hospital were bound to invest the legacy of 1000*l.* and use only the income for the general purposes of the hospital on condition that a bed named "the Eleanor bed" was maintained, and for an order that the money should be invested in the name of the Official Trustee of Charitable Funds.

The case had been adjourned that inquiry might be made whether there was any general practice as to investing legacies of this kind and now came on for hearing. The secretary to the hospital proved that he had made inquiries at the principal hospitals and found that there was no established practice. If it was thought advisable, and the financial position of the hospital admitted, the legacy was invested. If not it was not. The secretary to the Charity Commissioners produced a long list of legacies, generally of 1000*l.*, of a similar character which had been to their knowledge invested as capital. In these cases, however, the words "endow" or "maintain" or similar words occurred either coupled with "found" or alone. There was no case in which the word "found" occurred alone. There was evidence that the annual cost of maintaining a bed or cot in a London hospital was about 75*l.*, much more than the income of 1000*l.* invested in trust investments.

E. Beaumont, for the Attorney-General. The list furnished by the Charity Commissioners shews that the gift of 1000*l.* to establish or endow a bed in a hospital is a very common form of bequest, and it is considered to be a bequest of money to be invested and used as an endowment. I admit that the words in many of the cases are such as could not be understood in any other way, and "found" does not occur alone. But I submit that the intention of the testator clearly was that the 1000*l.*

should be set aside and kept for ever and the bed maintained from the income. There is no direct authority on the point, but in *Salusbury* v. *Denton* (1) there was some discussion as to the meaning of the word "foundation," and it appears to have been held that it implied maintenance. The Attorney-General will be satisfied with a declaration as to construction; he does not wish to press the charity for immediate investment.

P. W. Baker-Wilbraham (*Sargant* with him), for the hospital. The list produced is not exhaustive; it is only a list of instances one way, and there may be as many the other way. The words are different. "Found" never occurs alone in the list and is much more colourless than the words in the list, which all include "endow" or some equivalent word. We have shewn that the practice of hospitals in these cases depends on their financial position, and the testator knew that this hospital was in such a position that a gift of 1000*l.*, which must be invested and the income applied in maintaining the particular bed, would be more of a burden than a benefit. The evidence shews that a bed costs about 75*l.* a year to maintain, much more than the income of 1000*l.* The rules only give the donor the power of naming a bed. The testator knew of the rule and intended to make a gift in accordance with it.

SWINFEN EADY J. The short point raised by this action is as to the true construction of the will of Alfred John Randall. The testator by his will gave 1000*l.* to the Belgrave Hospital for Children in the following terms: [His Lordship read the words of the bequest, and continued.] The question is whether the hospital was entitled to treat that sum as part of the annual income of the hospital, and apply it accordingly, or whether there was an obligation on the hospital to treat that sum as capital money for the purpose of endowing and providing income for a bed, and therefore to invest the sum and deal with the annual income only. Dealing with the language of the will, "To the Belgrave Hospital for Children to found a bed to be called 'the Eleanor bed,'" it is quite obvious that the intention of the testator was to establish something. He says "to found a bed," which

(1) (1857) 3 K. & J. 529.

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involves the idea of establishing it; and it is established by providing a capital sum, the revenue from which may maintain it or be applied to its maintenance. The suggestion is that the language of the will would be satisfied if some bed already existing in the hospital is called the "Eleanor bed," and that when that is once done the fund may be applied as part of the annual income of the charity and expended in the year in which it is paid over, if necessary, and dealt with as annual income. In my opinion the idea involved in founding a bed negatives any such dealing with the fund. It appears from the affidavit that has been filed by the secretary to the Charity Commissioners, who has searched the records of the Commissioners, that he has found a large number of cases shewing that it is a common practice of testators and of living donors, to give money for the purpose of establishing a bed or cot in some hospital, and frequently the sum is 1000*l*. The word "establishing" is not always used, nor is the word "founding" used, but various expressions are contained in the wills, and in letters evidencing voluntary gifts, involving the same idea. For instance, the words in a long list before me are sometimes "for endowing a bed or a cot," sometimes "for providing" for one, or "for the endowment in perpetuity," or for "founding and maintaining," or "establishing," and then sometimes "founding beds or cots in the hospitals." In my judgment it is not essential that any particular word or expression should be used in order that the fund may be treated as a capital investment. The question is whether on the true construction of the language used the gift was intended to be treated as capital. Whether the words are "to found a bed," or "to establish a bed," or "to endow in perpetuity a bed," or other similar or analogous expressions, the result is the same, namely, that the fund is to be used for the purpose of investment, so that by the income thereof, from time to time, so far as it will extend, the needs of the bed or cot may be satisfied. Then it was said that the money, 1000*l*., is not now sufficient to provide for one cot; that the annual expense is more than the income of that sum. The answer to that is that the income must be applied so far as it will extend. Then it was said that

in this case the testator knew the needs of the hospital, knew there was an overdraft at the bank, and must, having regard to a certain conversation, really have intended the fund to be applied as annual income. But this is a question of the construction of his will, and the conversation is not admissible in evidence for the purpose of interpreting the language the testator has used in his will.

Under those circumstances I decide that this fund can only be used for the purpose for which it was given, to found a bed; that is to say, as a capital fund. It is right that I should add that the only complaint is that the money has been applied for income purposes instead of capital, and in that sense not properly applied. It is, in my judgment, of the greatest importance, where property is given to a charity, that the terms of the gift should be strictly observed. I determine that, according to the true construction of the will, the 1000*l.* cannot be properly applied as annual income of the charity, but should be invested and the income applied, so far as it will extend, in the maintenance of a bed to be called the "Eleanor bed." It was suggested that that must necessarily involve establishing some new bed, but I see no reason for that. It would be sufficient for some bed already existing in the hospital to be appropriated for this purpose, and the bed named the "Eleanor bed," as I gather has been done. The fund must be invested, and the income will be applied towards the maintenance of the bed.

The Attorney-General does not ask for any immediate order for the replacement and investment of the fund.

The order made was a declaration in the terms above mentioned. Liberty to the Attorney-General to apply for the investment of the legacy in the name of the Official Trustee.

Solicitors: *Treasury Solicitor; Hollams, Sons, Coward & Hawksley.*

J. R. B.

WARRINGTON J.

1909

Oct. 15, 23.

In re KELLY'S SETTLEMENT TRUSTS. GUSTARD *v.* BERKELEY.

[1909 K. 481.]

Settlement—Appointment of Specific Sums of Stock—Surrender of Appointor's Life Interest—Immediate Possession — Death of Appointor — Hotchpot — Date at which Value of Appointed Stocks should be ascertained.

By the marriage settlement of Mr. and Mrs. Kelly stocks were assigned to trustees upon trust for Mrs. Kelly for life, and after her death (in the events which happened of her surviving her husband and no joint appointment by them having been made) then upon trust for such of the issue of the marriage as the survivor of them should by deed or will appoint, and in default of such appointment in trust for the children of the marriage in equal shares. The settlement contained a hotchpot clause in common form.

Mrs. Kelly on the occasion of the marriage of one of her daughters appointed that certain sums of stock forming part of the settlement trust fund should immediately after the marriage be held in trust for the daughter for her absolute benefit, and Mrs. Kelly assigned and surrendered her life interest in the appointed stocks to the daughter. The stocks were accordingly transferred to the trustees of the daughter's settlement immediately after their marriage. Mrs. Kelly died and the trust funds became divisible:—

Held, that the daughter must bring into hotchpot the share appointed to her at its value at the date of the death of Mrs. Kelly.

By the marriage settlement of Mr. and Mrs. Fitzroy Kelly, dated August 10, 1869, certain stocks and securities were assigned to trustees upon trust to pay the income thereof to Mrs. Kelly for her separate use, and after her death (in the event which happened of her surviving Mr. Kelly) upon trust for such of the issue of the marriage upon such conditions and in such manner as Mr. and Mrs. Kelly should by deed jointly appoint, and in the event (which happened) of no such appointment being made, then as the survivor of them should by deed or will appoint, and in default of such appointment in trust for all the children of the marriage who should attain twenty-one or being daughters should marry in equal shares. The settlement contained the following hotchpot clause:—"Provided always that no child who or whose issue shall take any part of the said trust fund under any appointment in pursuance of either of the powers hereinbefore contained

shall be entitled to any further share in the unappointed part of the said trust fund without bringing the share or shares appointed to him or her or his or her issue into hotchpot and accounting for the same accordingly."

Mr. Kelly died in February, 1877, leaving three daughters, Annie Elizabeth Mary, Winifred Seymour, and Rosalie Blanche.

By a deed poll dated July 13, 1894, Mrs. Kelly appointed that certain sums of stock, forming part of the funds the subject of her settlement of August 10, 1869, should immediately after the then intended marriage of her daughter Winifred Seymour Kelly with Mr. E. M. Euan-Smith vest in and be held in trust for the said Winifred Seymour Kelly for her absolute benefit; and by the same deed Mrs. Kelly assigned and surrendered unto Winifred Seymour Kelly the life interest of her (Mrs. Kelly) in the said sums of stock to the intent that Winifred Seymour Kelly might immediately upon the solemnization of her intended marriage become absolutely entitled in possession to the stock, and that the same might be immediately transferable by the trustees of Mrs. Kelly's settlement to Winifred Seymour Kelly, her executors, administrators, or assigns.

By Mr. and Mrs. Euan-Smith's marriage settlement, dated July 14, 1894, Winifred Seymour Kelly assigned these sums of stock to trustees. The marriage was duly solemnized and the stocks transferred to the trustees of Mr. and Mrs. Euan-Smith's settlement.

On the occasion of the marriage of Rosalie Blanche Kelly to the Reverend M. S. Farmer in 1901 Mrs. Kelly made a similar appointment in her favour, and the specific sums of stock were transferred to the trustees of Mr. and Mrs. Farmer's settlement. A similar appointment and transfer were also made in favour of Annie Elizabeth Mary Kelly when she married Mr. G. C. M. Hall in 1906.

Mrs. Kelly died on October 26, 1908, without having made any other appointment. The trust funds the subject of her settlement thereupon became divisible, and questions arose as to the date at which the value of the sums of stock appointed to the daughters ought to be ascertained for the purpose of bringing them into hotchpot, and this summons was taken out for the

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determination of the question. There was evidence that at the date of the appointment in favour of Mrs. Euan-Smith in 1894 the sums of stock appointed to her were of the value at market price of 20,685*l.*, and at the death of Mrs. Kelly in 1908 they were only worth 16,161*l.* The stocks appointed to Mrs. Farmer were of the value of 19,216*l.* in 1901, when they were appointed to her, and they had fallen to 16,346*l.* in 1908. The stocks appointed to Mrs. Hall were worth 17,133*l.* in 1906 and were valued at 15,758*l.* in 1908.

Brabant, for the trustees of the Kelly settlement.

Cave, K.C., and *Sargant*, for the trustees of Mrs. Euan-Smith's settlement. The value of the stocks appointed to Mrs. Euan-Smith ought to be taken as at the death of the tenant for life. In form the appointments are to take effect as from their date but in reality they are appointments of reversions and take effect on the death of the tenant for life. The hotchpot clause in the mother's will is in the usual form and refers to that date, and the child has to account for the share appointed to her, namely, the reversion. It cannot make any difference whether there has been a voluntary surrender of the life interest. The Court still has to consider the effect of the hotchpot clause without reference to the surrender. There is no authority on the point, but the essence of the provision is equality at the time of division. If the other view is to prevail the appointee to whom the first appointment was made would be in a better position than subsequent appointees, because the reversion being longer postponed would be of less value than the subsequent shorter reversions.

Rowden, K.C., and *Austen-Cartmell*, for the trustees of the other two daughters' settlements. The only way in which justice can be done in a case like the present is to take the value of the appointed stock at the date of the appointment. Suppose the stocks had been sold and that the first daughter was paid in cash, it could not be contended that she ought not to bring into account the sum of cash which passed into her hands. It is said that the hotchpot clause only ought to be considered; but suppose the investments appointed to the first daughter fell in

value to nothing, she could not claim a full share on distribution without bringing anything into hotchpot. Here Mrs. Euan-Smith has had the investments absolutely; they have been taken out of the hands of the trustees of the original settlement, and she could do what she liked with them. In the case of advances their value is taken as at the date when they are made, and not at the date when they are brought into account: *Watson* v. *Watson* (1); and it is submitted that the same rule applies here. If the stocks appointed to Mrs. Euan-Smith had increased in value she could not have been charged with the increased amount. The appointment and surrender were a final transfer to her and fixed the value of the stock: *In re Bacon's Settlement Trusts.* (2) The hotchpot clause is silent as to the date at which the value of the stocks is to be ascertained, but it should be the date at which the appointee gets them, whether by means of a surrender or not. It is misleading to call this a reversion; it fell in on the surrender, and after that the property cannot be treated as divided into a life estate and a reversion. It must not be assumed that Mrs. Kelly could only appoint in such a way that the fund should fall into possession after her death. If the applicants are right, and in cases of appointment of specific investments, not of cash, the value of the appointed securities is to be ascertained at the death of the tenant for life, it will lead to all sorts of difficulties and anomalies. For instance, if the appointor appoints one farm and that farm is badly worked and depreciates in value, and another farm is retained unappointed and goes up in value, the appointee ought not to be allowed to account only for the lessened value of his farm; otherwise he would be profiting by his own want of skill. Hotchpot is intended to compensate people who have been damnified by the appointment, and the time at which the fund falls into the appointee's possession is the moment at which they suffer. The appointee takes for better or for worse. If Consols are appointed to him and he sells them and buys mining shares and makes large profits, is he to account for those profits? If trust securities are sold and the cash appointed to one child and other

(1) (1864) 33 Beav. 574.
(2) (1889) 42 Ch. D. 559, 564.

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securities appointed in specie to another child, is the latter, if the securities fall to nothing, to account for nothing?

No reply was called for.

WARRINGTON J. The question in this case is as to the mode in which a common form hotchpot clause contained in a marriage settlement is to be applied in the events which have happened, and the concrete question that has arisen is whether, for the purposes of the hotchpot clause, certain specific amounts of stocks and shares appointed to three children of the marriage are to be brought into account at their value at the dates of the appointments or at their value on the death of the tenant for life. [His Lordship stated the facts, and continued:—] The question is, what is the date at which the stocks are to be valued? There is no question that, if Mrs. Kelly had made the appointments in the form in which they were respectively made and had not surrendered her life interest, all that the trustees of her settlement would have had to do would have been on the death of the tenant for life, when the fund became distributable, to transfer to the trustees of each of the other settlements these specific sums of stock appointed to the several daughters, and of course they would then, for the purposes of the hotchpot clause, have had to be brought into account at their value on the day of the death of the tenant for life. As to that there can be no question. The real question is, does the fact that the tenant for life surrendered her life interest make any difference as to the date at which the value is to be ascertained? In my opinion the question turns upon the true construction of the hotchpot clause and on nothing else. That clause I need not read again, but it directs that no daughter who takes any part of the trust funds under any appointment shall take any share of the unappointed funds without bringing into account the share appointed to her. Now what is it that she is to bring into account? She is to bring into account the share appointed to her, and the share appointed to her is that which is referred to in the previous part of the hotchpot clause as that which she takes under the appointment. That is what is to be brought into hotchpot—the share which she takes under the appointment. What is it which she

takes under the appointment? Under the appointment she takes the specific sums of stock, subject to the life interest of her mother. It seems to me that the fact that the mother surrendered her life interest is immaterial for the purpose of the consideration of the hotchpot clause and its application, because the possession of the funds at the date of the appointment is not by virtue of the appointment, but is by virtue of the act of the tenant for life in surrendering her life interest. It makes no more difference than if the tenant for life had by way of an allowance during her lifetime paid to her daughter the income arising from these trust funds. It is perfectly true that there may be certain anomalies which may arise if that is the way in which the fund is to be applied, but those anomalies result, if they do result, not from the form in which the appointment is made, but from the act of the tenant for life in surrendering the life interest. The appointment remains as an appointment of these specific funds, subject to the life interest. It is that which the appointee takes, and that alone; and it is that which the several appointees must bring into account, namely, the stocks appointed to them at their value as on the date of the death of the tenant for life.

Solicitors: *Busk, Mellor & Norris; Minet, May & Euan-Smith.*

H. C. R.

WARRINGTON J.

1909

Nov. 11, 12.

WILLÉ *v.* ST. JOHN.

[1908 W. 816.]

Vendor and Purchaser—Restrictive Covenants—Building Scheme—Right of Purchasers inter se—Land Transfer—Registration—Conditions annexed to Title—Land Transfer Act, 1875 (38 & 39 *Vict. c.* 87), *s.* 84—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *Sched I.*

In 1903 fourteen acres, forming part of the D. estate, were conveyed to M. Holmes, who covenanted with the vendor and the owners or owner for the time being of the estate to observe certain restrictive conditions, under which only dwelling-houses were to be built on the land, so as to bind the hereditaments thereby conveyed into whosesoever hands the same should come. Mr. Holmes caused himself to be registered in the Land Registry as proprietor of the fourteen acres. The restrictive conditions were not entered at that time, but on April 6, 1905, they were entered on the register as affecting the whole of the land comprised in the title. On the same day Mr. Holmes transferred to the plaintiff a plot of land forming part of the registered property, and the plaintiff covenanted to observe the conditions. In 1907 Mr. Holmes conveyed and transferred to four purchasers the plot adjoining the plaintiff's plot, and they built thereon a church and clergyman's residence. The plaintiff brought this action against Mr. Holmes and the four purchasers for an order directing them to pull down the church or for damages:—

Held, that the registration of the restrictive conditions did not of itself annex them to the land; the conditions in the deed of 1903 were for the benefit of the owners of the D. estate; there was no building scheme affecting the land of the common vendor; and the plaintiff could not enforce the conditions against the defendants.

By an indenture of April 19, 1903, fourteen acres forming part of the Du Cane estate were conveyed by the then owners of the estate to Montagu Holmes in fee simple, and the conveyance contained the following covenant:—"And the purchaser doth hereby for himself his heirs and assigns covenant with the vendor and with the trustees their heirs and assigns and the owners and owner for the time being of the Du Cane family estates at Streatham aforesaid to observe the stipulations contained in the first schedule hereto so as to bind the hereditaments hereby conveyed into whosesoever hands the same shall come." The first schedule contained stipulations that the purchaser should construct a road, erect a fence, and do other things, and

continued as follows: "(4.) No building shall be erected on any part of the land hereby conveyed other than private dwelling-houses (provided that the term 'private dwelling-houses' shall not be deemed to include workmen's flats) except that such part as abuts on the High Road from Streatham to Croydon (hereinafter called the said High Road) and the plot of land at the corner of the said High Road and Guildersfield Road coloured blue on the said plan for a depth of 120 feet from the said High Road may be used for the erection of shops. (5.) No building shall be erected fronting on the roads marked with the letters 'C' and 'D' and the Ellison Road shewn on the said plan and on the north side of the road marked with the letter 'E' on the said plan of a less cost in material and labour calculated at the lowest current prices than 350*l.* (6.) No building shall be erected fronting on the said High Road of a less cost in material and labour calculated as aforesaid than 500*l.* (7.) No building shall be erected fronting on the south side of the said road marked 'E' shewn on the said plan of a less cost in material and labour calculated as aforesaid than 300*l.* (8.) No blocks of flats shall be erected on any part of the land hereby conveyed containing suites of rooms the cost of which in material and labour calculated as aforesaid shall be less than 200*l.* for each suite. (9.) No building to be erected at the corner of Guildersfield Road and the said High Road shall be of a less cost in material and labour calculated as aforesaid than 600*l.* and the same shall not be used for carrying on the business of a public-house or beer-house or any other business involving the sale of intoxicating liquors including the trade of a grocer having a licence to sell intoxicating liquors."

On May 13, 1903, Mr. Holmes caused himself to be registered in the Land Registry as proprietor with a possessory title of the fourteen acres which had been conveyed to him, and certain mortgages created by him were entered as affecting the land, but no mention was made at that time of the existence of the restrictive covenants. On April 6, 1905, Mr. Holmes caused an entry to be made on his registered title setting out the above stated conditions of the first schedule of the conveyance of April 19, 1903, as affecting the whole of his land comprised in the title. This was done under

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s. 84 of the Land Transfer Act, 1875, as amended by the First Schedule to the Land Transfer Act, 1897, and r. 223 of the Land Transfer Rules, 1903.

On the same April 6, 1905, Mr. Holmes and his mortgagees transferred to the plaintiff, Mr. W. Willé, a plot of ground forming part of the fourteen acres, and the plaintiff covenanted with him to observe the restrictions as to building, and also some other restrictions not mentioned in the deed of April 19, 1903. The transfer to the plaintiff was registered on April 12, 1905, together with the restrictions affecting his particular plot. On June 26, 1907, Mr. Holmes and his mortgagees conveyed the plot adjoining the plaintiff's plot to four clerical gentlemen to hold the same subject to the stipulations contained in the deed of April 19, 1903, and Mr. Holmes covenanted that he would raise no objection to their building a church and a clergyman's residence on the land sold to them. The consent of the owners of the Du Cane estate to this relaxation of the conditions was not obtained. An instrument of transfer was also executed and registered. The church and residence were built, and the plaintiff alleged that their erection seriously depreciated the value of his plot. He brought this action against Mr. Holmes and the four purchasers for an order directing them to pull down the church or for damages.

F. Watt and *E. L. Hopkins*, for the plaintiff. The four clerical defendants are precluded by the conditions from erecting on their plots any buildings other than private dwelling-houses; they have no right to build a church; and we are entitled to enforce these conditions. The registered conditions are binding on every purchaser of any part of the fourteen acres, and he can enforce them against other purchasers. A plan of the estate was given to us at the date of our purchase, but we might have had some difficulty in proving the existence of a building scheme as defined in *Elliston* v. *Reacher* (1) if the conditions had not been registered; but we submit that registration of restrictive conditions has the effect of constituting a building estate subject to a scheme. Sect. 84 of the Act of 1875 says that all purchasers

(1) [1908] 2 Ch. 374, 665.

shall be deemed to have notice of the conditions. The owner of the estate himself registered the conditions under s. 84; and he did so some time after his purchase. That was under the powers given by the First Schedule to the Land Transfer Act, 1897, and r. 223 of the Land Transfer Rules, 1903. By that registration the conditions were annexed to the estate, and all purchasers were affected with notice of them. They were not for the benefit of Mr. Holmes only. None of the conditions could be broken without the consent of all the purchasers of plots on the estate: *Ground Rent Development Co.* v. *West.* (1)

[WARRINGTON J. referred to *Nottingham Patent Brick and Tile Co.* v. *Butler.* (2)]

The area of this estate was defined within *Reid* v. *Bickerstaff* (3) and it was subject to the conditions. Registration gave us an additional power to enforce those conditions against Mr. Holmes and purchasers from him: *Spicer* v. *Martin* (4); *Rogers* v. *Hosegood.* (5) The Court will infer from the registration that at all events Mr. Holmes was bound by the conditions.

[WARRINGTON J. The conditions were imposed, not by Mr. Holmes, but by, and for the benefit of, the owners of the Du Cane estate. Mr. Holmes was bound by them, and his only right under the registration was a right to be indemnified by purchasers from him.]

The conditions have been registered and cannot be removed without the assistance of the Court. Registration is evidence that they are annexed to the land whatever the intention of the owner may have been.

[WARRINGTON J. The object of the section is to preclude purchasers from saying they have no notice of conditions which have been annexed to the land in some legal way before they were registered.]

We warned the defendants before the church was built that we should raise this objection, and they ought not to have continued building.

(1) [1902] 1 Ch. 674.
(2) (1886) 16 Q. B. D. 778.
(3) [1909] 2 Ch. 305, 319.
(4) (1888) 14 App. Cas. 12.
(5) [1900] 2 Ch. 388.

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Rowden, K.C., and *A. Adams*, for Mr. Holmes, and *P. F. Stokes*, for the other defendants, were not called upon to argue.

WARRINGTON J. The question in this case is whether the plaintiff, who is the purchaser of a small plot of land forming part of about fourteen acres of land conveyed as a whole to his vendor, can enforce certain restrictive conditions, applied by a previous vendor to these fourteen acres as a whole, against a purchaser from the same vendor of another plot. In other words, the plaintiff says that there was affecting this land a general building scheme from which it must be inferred that every purchaser of every plot was entitled to enforce restrictive conditions against every purchaser of every other plot. Now the law with regard to this subject is stated by Parker J., in terms which have been approved by the Court of Appeal, in a case of *Elliston* v. *Reacher*. (1) He says this: "In my judgment, in order to bring the principles of *Renals* v. *Cowlishaw* (2) and *Spicer* v. *Martin* (3) into operation"—those are the leading building scheme cases—"it must be proved (1.) that both the plaintiffs and defendants derive title under a common vendor; (2.) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3.) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4.) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they

(1) [1908] 2 Ch. 374, 384.
(2) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.
(3) 14 App. Cas. 12.

were also to enure for the benefit of other lands retained by the vendors." That is Parker J.'s statement of the conditions which must be fulfilled in order that such an action as the present may succeed. [His Lordship referred to the conveyance of April 19, 1903, and read the covenants and conditions contained in the first schedule, and continued:—] To pause there for one moment, at that time there plainly was no building scheme. The covenant was in terms inserted for the benefit of the then vendors, the owners of the rest of the Du Cane estates, and I gather from the evidence of the plaintiff's own witness that it was inserted as the result of an arrangement between themselves and the owners of an adjoining estate, I suppose to keep their two estates up to a certain standard. But whether that last fact were so or not, on the terms of the deed the only persons who could enforce this covenant, which affected not particular plots, but affected the land as a whole, would be either the trustees, their heirs or assigns, or the owners for the time being of the rest of the Du Cane estates from which these fourteen acres were separated. [His Lordship concluded his statement of the facts, and proceeded:—]

If it had not been for the 84th section of the Land Transfer Act of 1875 the case would have been hopeless. The conditions in question were imposed not by the common vendor. The conditions were imposed by the previous vendor of the land in the way in which I have already mentioned. The land as a whole was subject to those conditions. Any purchaser from Holmes was bound by those conditions, not by virtue of any building scheme initiated by Holmes, but by the obligation imposed by the deed of 1903, which covered the whole of the land. There was no laying out by Holmes in plots or otherwise of his land in a certain specified manner, and there was no building scheme. If the matter had rested there, there is nothing from which I can infer an intention on the part of Holmes and purchasers from him that the purchasers from him should be entitled to enforce these restrictive covenants inter se. No one could have enforced those covenants except the Du Cane trustees, with whom the covenants were entered into. Now has the 84th section of the Land Transfer Act of 1875 as amended by the Act of

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1897 made any difference? Is the effect of that section such that, from the placing of the conditions on the register, I must infer an intention not only to impose these conditions on the land, but to impose on every purchaser the obligation of performing those conditions as an obligation which could be enforced against him by other purchasers? The 84th section is in these terms: "Where any land is about to be registered, or any registered land is about to be transferred to a purchaser for valuable consideration, there may be registered as annexed thereto, subject to general rules and in the prescribed manner, a condition that such land or any specified portion thereof is not to be built on, or is to be or not to be used in a particular manner, or any other condition running with or capable of being legally annexed to land, and the first proprietor"—that means of course the first registered proprietor—"and every transferee, and every other person deriving title from him, shall be deemed to be affected with notice of such condition; nevertheless, any such condition may be modified or discharged by order of the Court, on proof to the satisfaction of the Court that such modification will be beneficial to the persons principally interested in the enforcement of such condition."

Then it is amended by the First Schedule to the Act of 1897 as follows: "Conditions may be annexed to land at any time, and the section shall apply to any restrictive condition capable of affecting assigns by way of notice." The material part of that schedule so far as the present case is concerned is the provision that conditions may be annexed at any time; and the really operative part of the section is that which imposes upon the first proprietor and every transferee notice of those conditions. There is nothing in the section which provides that the mere registration of the conditions shall annex them to the land and render those conditions capable of being enforced by the owner of one plot against another owner of another plot. In my judgment that section assumes that there is independently of the statute some legal obligation which annexes the conditions to the land, and all that it does is to authorize the registration of those conditions as annexed. It does not itself provide that by registration they shall be annexed, and there is nothing that I

can find in the Act which contemplates the imposition by the statute of any obligation or condition on the land which is not already imposed, either by grant, by reservation, by covenant, or in some other known legal way. In my judgment, therefore, if the conditions had been entered on the register without any previous covenant, or obligation, or grant, or other legal mode of creating them, they would not have been effective to impose upon these purchasers such liability as the plaintiff insists upon in the present case. But the facts of the present case are not those which I have for the moment assumed. What Holmes really did upon the present occasion was merely to put on the register, and therefore give notice thereof to subsequent transferees in accordance with the terms of the statute, the conditions which already existed, which had already been annexed to these fourteen acres of land by the conveyance of 1903; and in my judgment by doing that he in no way affected or purported to affect the legal position created by the imposition in that deed of those conditions. There is no necessity to so strain the words of s. 84 as to give it any other effect than that which I have mentioned, and if that is so there is nothing whatever in this case from which, according to the rules laid down by this Court, I can infer any building scheme on the part of Holmes. There are no common plans, no common conditions given to purchasers of plots from him; there is not even the laying out in plots of the fourteen acres which he so purchased. In my opinion this case does not come within the principles in accordance with which one purchaser can enforce a restrictive covenant against another purchaser. The result is, therefore, that there must be judgment for the defendants with costs.

Solicitors: *Webster & Webster; Clowes, Hickley & Steward; Fooks, Chadwick, Arnold & Chadwick.*

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Nov. 8, 15.

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[1909 A. 188.]

Charity—Site for School—Gift of Land for Education of Poor—Discontinuance of Weekday School—Continued Use as Sunday School—Cesser of Use for Purposes of the Act—Reverter— School Sites Act, 1841 (4 & 5 *Vict. c.* 38), *s.* 2.

The expression "ceasing to be used for the purposes in this Act mentioned" in the reverter clause contained in s. 2 of the School Sites Act, 1841, means "ceasing to be used for such of the purposes in this Act mentioned as are specified in the deed of grant."

In 1868 S. executed a deed poll under s. 2 of the School Sites Act, 1841, conveying to the minister and churchwardens of a parish a piece of land for the purposes of the Act and upon trust to permit the premises and all buildings to be erected thereon to be used as a school for the education of children and adults of the poorer classes of the parish and for no other purpose. The schools were to be open to the inspection of the Established Church inspectors and managed by the principal minister of the parish, who was to superintend the religious and moral instruction of the scholars and might use the premises for a Sunday school. A school was erected on the land and used till 1907 as a public elementary school, when it ceased to be used except as a Sunday school. S. claimed that the premises had reverted to him under the Act; the Board of Education contended that they were still devoted to charity and that a scheme ought to be settled for the future administration thereof:—

Held, that inasmuch as the school had ceased to be used for the purposes specified in the deed poll it had reverted to the estate of S., the donor, although it had been continuously used for other purposes specified in the Act.

The question in this case was whether a piece of land which had been granted as the site of a school under s. 2 of the School Sites Act, 1841, had reverted to the estate of which it had originally formed part.

The following statement of facts is taken from the judgment of Warrington J.:—

"On April 23, 1868, Lancelot Shadwell and the defendant Charles Lancelot Shadwell executed a deed poll conveying the land in question to the minister and churchwardens of the parish. That deed, so far as it is material, is in the following terms:—'We Lancelot Shadwell and Charles Lancelot Shadwell

under the authority of the Acts of the fifth and eighth years of the reign of Her Majesty' (the Act of the eighth year is merely an amending Act and is not material to the present case) 'for affording facilities for the conveyance and endowment of sites for schools do hereby (freely and voluntarily and without valuable consideration) grant and convey unto the minister and churchwardens for the time being of the parish of Northolt in the county of Middlesex all that piece of ground'—then follows a description of the land in question—'to hold the same unto and to the use of the said minister and churchwardens and their successors for the purposes of the said Acts and upon trust to permit the said premises and all buildings thereon erected or to be erected to be for ever hereafter appropriated and used as and for a school for the education of children and adults or children only of the labouring manufacturing and other poorer classes in the parish of Northolt aforesaid and for no other purpose. And it is hereby declared that such schools shall be at all times open to the inspection of the inspectors of schools for the time being appointed in conformity with the Order in Council bearing date the tenth day of August 1840 and shall always be in union with and conducted according to the principles and in furtherance of the ends and designs of the National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales and subject to and in conformity with the declaration aforesaid such school and premises and the funds and endowments thereof in respect whereof no other disposition shall be made by the donor shall be controlled and managed in manner following that is to say the principal officiating minister for the time being of the said (parish) or (ecclesiastical district) shall have the superintendence of the religious and moral instruction of all the scholars attending such school and may use or direct the premises to be used for the purposes of a Sunday school under his exclusive control and management. But in all other respects the control and management of such school and premises and of the funds and endowments thereof and the selection appointment and dismissal of the schoolmaster and schoolmistress and their assistants (except when under the provisions hereinafter

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mentioned the dismissal of any master mistress or assistant shall be awarded by the bishop of the diocese or the arbitrators as the case may be) shall be vested in and exercised by a committee consisting of' the persons named or referred to. The deed contained further elaborate provisions intended to secure what I may call the Church of England character of the school. Shortly after the execution of the deed school buildings were erected on the land, the cost being defrayed partly by means of voluntary subscriptions, and partly by means of grants from the National Society and the Committee of Council on Education respectively. Lancelot Shadwell died in April, 1875, and C. L. Shadwell became tenant for life of the estate. From the time of the erection of the buildings until the summer holidays of 1907 the land and the buildings thereon were used as a public elementary school. The education authority then opened a provided school, and the premises in question ceased to be used for the purposes of a school, except that a Sunday school has, as before, been held there continuously down to the present time. This has been done by permission of the defendant Shadwell. It appears from the oral evidence and from the correspondence that he from the first took up the position that the premises reverted to and became a portion of the estate of which they originally formed part, and of which he is now tenant for life in possession. The rector and churchwardens appear to have accepted this view, but of course nothing they have done can affect the validity of any charitable trust to which the premises may be subject. In 1908 the Board of Education proposed to make a scheme for the future administration of the alleged charity; the defendant Shadwell then made his claim to the premises; and this action was commenced against him and the rector and the churchwardens of Northolt for the purpose of obtaining the determination of the question as to his title, and, if that should be decided against him, the settlement of a scheme by the Court."

Sir W. S. Robson, A.-G., and *E. Beaumont*, for the plaintiff. The question is whether in the circumstances the site of this school has reverted to the donor, and we submit that it has not.

Although not used as a day school, these premises have been continuously used as a Sunday school. Thus they have been used for a "religious and useful" purpose within s. 2 of the School Sites Act, 1841, and for "education" within the terms of the deed poll, and they have not "ceased to be used for the purposes in this Act mentioned" and have not reverted to the donor's estate. The school is well adapted for use for evening schools and other modern purposes, and a scheme for its use in that way ought to be prepared. The intention of the Act and of the deed poll was to provide religious education of a more specific kind than that of a board school, and if the trustees abandon it they will be guilty of a breach of trust. A scheme can be made under the ordinary jurisdiction of the Court: *Attorney-General* v. *Edalji* (1); *Attorney-General* v. *Price*. (2) Those cases shew how far the Court will go in endeavouring to keep a charity on foot. In *In re Waring* (3) it was held that the use of a Church school founded for the education of the poor as a Sunday school was sufficient to prevent a legacy for the benefit of the school from lapsing. The fact that the donor consented to the use of this school as a Sunday school is immaterial, for the trustees could not release their rights. They did not even know what their rights were. This is a question of fact, and the school has never ceased to be used. Reverter can only take place under the provisions of the Act; therefore the determination of this question depends upon the construction of s. 2: *In re Trustees of Hollis' Hospital and Hague's Contract*. (4)

Cave, K.C., and *T. T. Method*, for the defendant C. L. Shadwell. When the school ceased to be used as a day school it ceased to be used for the purposes of the Act. The possible objects laid down by s. 2 must be distinguished from the actual objects mentioned in the deed poll. By the section an acre of land may be granted as a site for a school for (1.) the education of poor persons, or (2.) for the residence of the schoolmaster or schoolmistress, or (3.) otherwise for the purposes of the education of such poor persons in religious and useful knowledge. It

(1) (1907) 97 L. T. 292; [1907] W. N. 174.
(2) (1908) 24 Times L. R. 761.
(3) [1907] 1 Ch. 166.
(4) [1899] 2 Ch. 540, 553.

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need not be granted for all those purposes; it may be granted for only one of them. The grant in this case was for the first purpose only. The provision for reverter means that the land is to revert if it ceases to be used for such of the purposes of the Act as are specified in the grant, namely, in this case the first purpose only. The fact that it is still used for other purposes of the Act is immaterial. The preamble of the Act shews that it was passed to give greater facilities for the "erection of schools and buildings for the purposes of education." Keeping this Sunday school is not part of the work of the school; it is purely optional. It is not one of the trusts or objects of the deed poll; it is only a power which continues as long as the main purpose of the deed continues. So there has been a total cesser of use under the deed; for the Act was intended to promote education, not to promote religion. We agree that the rector and churchwardens could not surrender and have not surrendered anything, but the site has reverted and has only been used for a Sunday school by our consent. In *In re Waring* (1) a day school was still carried on. In the present case there is no longer a charity. Land granted under s. 6, which contains no reverter clause, is not unsaleable if it has ceased to be used for the purposes of the grant: *Hornsey District Council* v. *Smith.* (2) A scheme ought not to be made so as to oust the reverter clause and defeat the intention of the donor.

J. W. M. Holmes, for the rector and churchwardens, submitted to the judgment of the Court.

E. Beaumont in reply. The Board of Education have only said that it is not necessary to use this land for a day school, not that it cannot be so used. That is not enough to enable the donor to take the building and use it for other purposes. The land was given "for the purposes of the said Acts," and the reverter clause does not take effect till the land has ceased to be used for any of the purposes sanctioned by s. 2. The operation of the grant cannot be narrowed down to one particular purpose; it is for all the purposes of the Act. A decision against us will have very serious results, for the Board have always assumed that they were at liberty to take in the schoolmaster's house and

(1) [1907] 1 Ch. 166. (2) [1897] 1 Ch. 843.

make it part of the school, and to build on a playground if it is convenient to do so. The Court must keep strictly within the words of the Act and must not enlarge the reverter clause.

Cur. adv. vult.

Nov. 15. WARRINGTON J. The question in this case is whether the national school at Northolt, in Middlesex, has under the provisions of the School Sites Act, 1841, reverted to and become vested in the defendant Shadwell as the owner of the estate from which it was severed, or whether, as the Attorney-General contends, it is still the subject of a charitable trust capable of being carried into execution by means of a scheme. The other defendants in the action are the rector and churchwardens of the parish, as the trustees in whom the land and buildings are vested, if they have not become vested in the defendant Shadwell. The question turns upon the construction, and the effect in the particular case, of the School Sites Act, 1841 (4 & 5 Vict. c. 38). The material provision is s. 2: "Any person, being seised in fee simple, fee tail, or for life, of and in any manor or lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, or in Scotland being the proprietor in fee simple or under entail, and in possession for the time being, may grant, convey, or enfranchise by way of gift, sale, or exchange, in fee simple or for a term of years, any quantity not exceeding one acre of such land, as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge." Then there is a proviso with regard to grants by tenants for life; and then comes this proviso: "Provided also, that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise, or of any manor or land as aforesaid, as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding." In s. 10 an

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optional form of conveyance is given. [His Lordship stated the facts, and continued :—]

The defendant Shadwell contends that the premises ceased to be used for the purposes in the Act mentioned when they ceased to be used for the purposes of a day school, these being the only purposes for which, in substance, the grant was made, and, on the true construction of the Act, the purposes on the cesser of which the reverter was to take effect. The Attorney-General, on the other hand, contends that the premises are still used for the purposes of the education of poor persons in religious knowledge; that this is one of the purposes in the Act mentioned; and that therefore the reverter has not taken effect.

What, then, is the true construction of the Act? Are the words "the purposes in this Act mentioned" to be read without reference to the terms of the grant, or may those terms be referred to as limiting the generality of the expression in question? The point is without direct authority. Two cases have been cited in which national schools have ceased to be used as day schools and schemes have been established by the Court, but in neither of those cases did the present question arise. In *Attorney-General* v. *Edalji* (1) it does not appear that the grant was made under the School Sites Act at all. In *Attorney-General* v. *Price* (2), the case of the Caerphilly school, though the grant was made under the Act, the donor did not claim the premises, and the existence of a charitable trust capable of being executed was therefore assumed. In another case of *In re Waring* (3) the question was whether a legacy to a school had failed—the facts being similar to the present—and Kekewich J. held that it had not; but the case has no real bearing on the present. The Act specifies three purposes for which land may be granted—first, a school for the education of poor persons; secondly, for the residence of the schoolmaster or schoolmistress; and, thirdly, otherwise for the purposes of the education of such poor persons in religious and useful knowledge. The grantor may select his own purpose from amongst those three, and the operation of the Act is to give force and effect to his grant, even if he be only a limited owner. Can

(1) 97 L. T. 292; [1907] W. N. 174.
(2) 24 Times L. R. 761.
(3) [1907] 1 Ch. 166

it be the true construction of the Act that though the land ceases to be used for the purposes expressed in the grant, yet, nevertheless, if it is used for one or more of the other purposes in the Act mentioned, the reverter will not take place? I cannot take this view. I think you must read "the purposes in this Act mentioned" as meaning such of those purposes as are applicable to the case in question, namely, the purposes to which the land was devoted by the grantor. Now to what purpose was the land devoted in the present case? There can, I think, be only one answer to that question—to the purpose of a day school for the education of the poor, to be conducted according to the principles and in furtherance of the ends of the National Society. The mere holding of a Sunday school does not fulfil that purpose. According to the terms of the deed the holding of a Sunday school was merely permissive and ancillary to the purpose for which the grant was in truth made, which purpose would have been carried out though no Sunday school had been held. I think, therefore, that, looking at the substance of the matter, as I consider I am bound to do, I must hold that the premises have ceased to be used for the purposes in the Act mentioned, and have therefore reverted to the land of which they formed part, and are now vested in the defendant Shadwell and his successors in title, owners of that land. There must be a declaration accordingly. In the view I take there can be no question of a scheme, inasmuch as there is now no charitable trust to execute. I am glad to know that in this case the owner of the land does not desire to resume possession thereof for his own benefit, but merely to direct the purposes for which it shall be used; but this knowledge does not, of course, affect my judgment. It is not the practice in such cases to order the Attorney-General to pay costs, and I do not see how I can give any costs to the rector and churchwardens as against the land or as against the defendant Shadwell personally. There will therefore be a declaration such as I have indicated above, and no order as to costs.

Solicitors: *Solicitor to the Treasury; Rawle, Johnstone & Co., for Dr. H. F. Galpin, Oxford; Lydall & Sons.*

H. C. R.

NEVILLE J.

In re WILDE (A SOLICITOR).

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Nov. 12.

Solicitor—Country Solicitor and London Agent—London Agent's Bill of Costs—Taxation—Order of Course—Practice—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 3, 17.

A country solicitor is entitled, under s. 37 of the Solicitors Act, 1843, as "the party chargeable," to an order of course for taxation of his London agent's bill of costs without bringing any sum of money into Court.

Smith v. *Dimes*, (1849) 4 Ex. 32, followed.

Ward v. *Eyre*, (1880) 15 Ch. D. 130, distinguished.

MOTION.

Prior to March 31, 1908, Messrs. Burchell, Wilde & Co., a firm of solicitors in London, acted for many years in various matters as solicitors for a Mr. Brass, of Barnstaple, Mr. W. Wilde, a partner in the firm, being the party who generally attended to Mr. Brass's business. On March 31, 1908, the firm dissolved partnership, and Mr. Wilde continued to act as solicitor for Mr. Brass with reference to a notice to treat served by the London and North Western Railway Company for the purchase of certain lands belonging to Mr. Brass. In May, 1908, Mr. Brass consulted a Mr. Seldon, a local solicitor at Barnstaple, with respect to the cash accounts and bill of costs he had received from the firm of Burchell, Wilde & Co., to various items of which he objected, and on July 17, 1908, Mr. Seldon, on instructions from Mr. Brass, wrote Mr. Wilde informing him that he (Mr. Wilde) was no longer to act for Mr. Brass in any matter. Correspondence ensued, and on November 13, 1908, it was arranged that as from that date Mr. Wilde should act as the London agent of Mr. Seldon in relation to the pending proceedings under the notice to treat. Subsequently differences arose between Mr. Seldon and Mr. Wilde, and on July 28, 1909, Mr. Seldon obtained ex parte, on a petition of course in the Chancery Division, an order of course in common form requiring Mr. Wilde within fourteen days of the service on him of the order to deliver "to the petitioner (Mr. Seldon) a bill of fees and disbursements in

all suits causes actions and other matters of business in which he has been employed as the agent for the petitioner," and so on, including a claim for the delivery up by Mr. Wilde of all documents and papers in his possession. This order was served on Mr. Wilde on the next day, July 29. Correspondence ensued between Mr. Wilde and Messrs. Church, Rendell & Co., then acting as the London agents of Mr. Seldon, Mr. Wilde objecting that the order of course was irregular on the ground (amongst others) that the relation of solicitor and client did not exist between Mr. Seldon and himself either under the Solicitors Act, 1843, or the Solicitors Remuneration Act, 1881, and requesting that they should consent to the order being discharged. Messrs. Church, Rendell & Co. replied that they considered there was no substance in the objection, and eventually, on August 21, they served Mr. Wilde with a notice of motion for a writ of attachment against him for not complying with the order of July 28. On the same August 21 Mr. Wilde served them with a notice of motion to discharge the order of July 28 on the ground (inter alia) "that the order was not properly obtained on a petition of course, and that the relation of solicitor and client either under the Solicitors Act, 1843, or the Solicitors Remuneration Act, 1881, did not exist between the said Arthur Frederick Seldon and William Wilde, and that the petition did not disclose the fact that the said William Wilde acted as solicitor for Charles Lot Brass mentioned in the said petition, and that the statement in the petition that the said William Wilde refused to deliver up the papers in his possession belonging to the petitioner was untrue, as the said William Wilde had no papers belonging to the petitioner, the papers in his possession having come into his possession as solicitor to the said Charles Lot Brass, and that the said William Wilde was not employed as agent for the petitioner in respect of some of the matters referred to in the petition."

The two motions now came on together.

Hon. F. Russell, K.C., and *Reeve*, for the motion to attach. The onus is on Mr. Wilde to shew that the order of course is wrong.

Micklem, K.C., and *Ward Coldridge*, for Mr. Wilde. There is

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no objection to delivery and taxation of the bill of costs on a proper order being made, but the order of course is manifestly wrong and not in accordance with the practice on the Chancery side. The relation between Seldon and Wilde is not that of client and solicitor, but that of principal and agent. Moreover, Wilde did not act for Seldon ab initio, and the latter is not entitled to the papers and documents of Mr. Brass which Mr. Brass handed over to Wilde as his solicitor. As to the practice, prior to the Act of 1843 a country solicitor could not obtain under the Solicitors Acts then in force an order of course for taxation of his London agent's bill of costs; but the Court in the exercise of its inherent jurisdiction, apart from statute, directed taxation of an agency bill on a special application, and generally upon the special term that the amount of the bill was brought into Court: *Ostle* v. *Christian* (1); *In re Smith* (2); and it is submitted that the same practice still obtains on the Chancery side: *Storer & Co.* v. *Johnson* (3); Daniell's Chancery Practice, 7th ed. pp. 1727—1729. Further, in *Ward* v. *Eyre* (4) the Court of Appeal, affirming Jessel M.R., held that a country solicitor is not within the definition of a "client" in s. 3 of the Act of 1870 for the purpose of s. 17 of that Act; and North J. in *Reid* v. *Burrows* (5) agrees with that view. Taxation proceeds on the Acts of 1843 and 1870, and it is submitted that the definition of "client" in the Act of 1870 must be read into the Act of 1843, and that the relation of principal and agent is not within the purview of s. 37 of the Act of 1843. But even if a country solicitor is a client of the London agent, he cannot on the Chancery side have an order of course, and can only obtain an order for taxation on a special application and upon special terms. *Smith* v. *Dimes* (6) may be cited against us. There the Court of Exchequer held that a country solicitor could under s. 37 of the Act of 1843 tax his London agent's bill, but there is no reported case in which it has been followed, and it conflicts with *Ward* v. *Eyre*. (4)

[NEVILLE J. It seems to me that the two decisions can well

(1) (1823) T. & R. 324.
(2) (1841) 4 Beav. 309.
(3) (1890) 15 App. Cas. 203.
(4) 15 Ch. D. 130, 134, 136.
(5) [1892] 2 Ch. 413.
(6) 4 Ex. 32.

stand together. This is not an application under the Act of 1870, but under s. 37 of the Act of 1843, which says that an order to tax can be obtained by "the party chargeable." Is there any case under s. 37 in which the amount of the bill has been ordered into Court?]

No; but in *Storer & Co.* v. *Johnson* (1) Lord Watson refers to the settled practice in Chancery. The only other reported case in which an order of course was made under s. 37 is *In re Maugham* (2), but that was a case between a London solicitor and his agent in Paris, and the point now before the Court was not raised. In any event the motion to attach is misconceived.

Hon. F. Russell, K.C., and *Reeve*, for Seldon, were not called upon.

NEVILLE J. This case has raised a point, which is not without difficulty, as to whether a country solicitor is entitled to obtain an order of course for taxation of the bill of his London agent. That, of course, is a question as between the country solicitor and the London agent, and the rights of the ultimate client are in no way affected or prejudiced by anything that takes place between these two. I have been referred to certain decisions, and the matter has been fully and carefully argued before me. Up to the Act of 1843 it is plain from the decisions of both the Equity and Common Law Courts that under the statutes then in existence there was no right on the part of the country solicitor to tax his London agent's costs. The Court of Chancery, however, had held that they had inherent jurisdiction to order such a taxation, but they only did so on the terms of the applicant bringing the amount of the bill into Court before taxation. I gather that the Common Law Courts had come to the conclusion that they had no such inherent jurisdiction, and they did not make such orders. *Smith* v. *Dimes* (3) is a decision of the Exchequer Court to the effect that after the passing of the Act of 1843 the country solicitor under s. 37 of that Act had a right to tax his town agent's bill, and that decision seems to me to have remained unchallenged from that date onwards. There are

(1) 15 App. Cas. 203, 208. (2) (1886) 2 Times L. R. 115.
(3) 4 Ex. 32.

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certain decisions in the Equity Courts to the effect that a country solicitor is not the client of the London agent so as to give him the benefit of s. 17 of the Act of 1870, and that he is not a client within the definition in s. 3 of that Act. But those decisions do not seem to me to conflict with the decision of *Smith* v. *Dimes* (1) that a country solicitor is entitled to obtain taxation under the Act of 1843 of his London agent's bill. Now, if that be so, the question is whether he can get an order for such taxation in a proper case upon a petition for an order of course, or whether he has to make a special application. It is argued that he must make a special application, because it has always been the practice in the Court of Chancery to require the payment into Court of the amount of the bill before the taxation proceeds; but s. 37 of the Act of 1843 provides that taxation shall proceed without the obligation to pay into Court at all, and, therefore, when once you get it that the country solicitor is entitled to tax his agent's bill, and has a statutory right under the Act of 1843 to tax, then of course it is quite impossible for the Court to impose the condition of bringing the money into Court. If that be so, is there any reason why a country solicitor should not obtain an order of course against his London agent, just as a client can obtain an order of course against his solicitor? I see none. That being so, the question I have to consider is whether the order that has been made in the present case is against the rights of the London agent, and whether there are any special circumstances connected with the case which rendered it improper to apply for an order of course. I have come to the conclusion that there are none. It appears to me that the application for the order is strictly limited to the relations of principal and agent between the country solicitor and his London agent, and that all that the London agent is directed to do under this order is to supply a bill of costs with regard to the matters in which he was employed by the country solicitor to act as his agent. The same result follows with regard to the delivery of documents. If the documents in the agent's hands are not held for the country solicitor, but are held for the lay client, then it appears to me that no order can be

(1) 4 Ex. 32.

made directing the agent to deliver the documents up to the solicitor. I think, therefore, that the order was rightly obtained. I think I ought to say further that although a dispute is raised in the affidavits (about which I say nothing) as to some special arrangement between the parties with regard to the division of the profit charges between them, if any such agreement did exist, it is a matter to be taken into account by the taxing Master when he makes his ultimate certificate as to what is to be paid by one side or the other. It seems to me, therefore, that the order was right, and that I must dismiss the motion to discharge it with costs. But of course it is not a case in which an order to attach ought to be made on the other motion, because the question I have decided was raised, and I think legitimately raised, by the respondent to that motion by his counter-motion to discharge the order of course. On the other hand, it has turned out that he has wrongly resisted the performance of the order. I think, therefore, that he must pay the costs of both motions, and there will be an order on him to deliver his bill of costs within twenty-one days.

Solicitors: *Church, Rendell & Co., for Seldon, Barnstaple; W. Wilde.*

H. L. F.

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In re THE DUKE OF MANCHESTER'S SETTLEMENT.

[1909 M. 627.]

Settled Land — Jointure Rent-charge — Arrears — "Incumbrance affecting the Inheritance" — Discharge out of Capital Moneys — Discretion of Court — Tenant for Life and Remainderman — Incidence — Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *s.* 21, *sub-s.* ii. — *Settled Land in Ireland — Sale — Irish Land Act*, 1903 (3 *Edw.* 7, c. 37) — *Irish Land Act*, 1904 (4 *Edw.* 7, c. 34).

Arrears of a jointure rent-charge, which was limited and secured by powers of entry and distress and by a term of years and trusts thereof in the usual way, are an "incumbrance affecting the inheritance of the settled land" within the meaning of s. 21, sub-s. ii., of the Settled Land Act, 1882, and may in a proper case, where their discharge would be the wisest course for all concerned, be discharged by the trustees of the settlement out of capital moneys in their hands, but conditionally upon the tenant for life agreeing that such payment shall be without prejudice to the question, should it arise, of the ultimate incidence of the liability for the arrears as between himself and the remainderman.

The dicta in *In re Knatchbull's Settled Estate*, (1884) 27 Ch. D. 349, and in *In re Frewen*, (1888) 38 Ch. D. 383, relating to the redemption of a jointure rent-charge under s. 21, sub-s. ii., considered and distinguished.

ADJOURNED SUMMONS.

This was an application by the trustees with power of sale of the above-mentioned settlement, dated September 7, 1878, who were also trustees of the 200 years jointure rent-charge term thereby limited, for the determination of (inter alia) the question whether, and if so to what extent, the arrears of the jointure rent-charge ought to be discharged out of the corpus or income of a sum of 58,256*l.* 3*s.* 2*d.* capital moneys in their hands representing the balance of the proceeds of the sale, made under the powers of the Settled Land Acts by the defendant the ninth Duke of Manchester as tenant for life, of certain estates in Ireland comprised in the settlement.

In 1904 the ninth Duke, in exercise of the power of sale vested in him as tenant for life, entered into contracts for the sale of the lands in question to the occupying tenants under the provisions of the Irish Land Acts, 1903 and 1904. The final allocation of the purchase-moneys was made in the Court of the Irish Land Commission

by Wylie J. on December 4, 1908, and in accordance therewith the incumbrances having priority to the above-mentioned settlement were (with two immaterial exceptions) discharged out of the proceeds of sale, and the balance was paid to the present applicants as trustees for the purposes of the Settled Land Acts of the settlement in question; 58,256*l.* 3*s.* 2*d.* had already been paid to the applicants, leaving a sum of about 10,000*l.* still to be received by them.

At the time of their sale in 1904 the Irish settled estates comprised in the settlement stood limited, subject to certain incumbrances paramount to the settlement, to the use that the defendant Consuelo Duchess of Manchester should receive for her jointure and in lieu of all dower and freebench the yearly rent-charge of 2000*l.* (to be increased on the death of a prior jointress, who died in 1907, to 3000*l.*) during the remainder of her life, the said rent-charge to be payable quarterly and to be secured by the powers of distress and entry therein set forth, and subject and charged as aforesaid to the use of the applicants for the term of 200 years without impeachment of waste upon the trusts thereinafter declared, and subject to the said term and the trusts thereof to the use of the defendant the ninth Duke and his assigns during his life without impeachment of waste, and after his death to the use of his first and every other son successively in remainder one after the other according to their respective seniorities and the heirs male of their respective bodies, with divers remainders over.

The trusts of the 200 years term were as follows: "Upon trust that if any yearly rent-charge hereinbefore limited shall be unpaid for sixty days after any of the times hereinbefore appointed for payment thereof then and so often as the same shall happen the trustees or trustee of these presents shall by and out of the rents and profits of the same premises or by the sale of timber not being ornamental timber or minerals or by mortgage of the same premises or any of them for all or any part of the same term or by all or any of the ways and means aforesaid or by any other reasonable ways or means raise and pay the said rent-charge so in arrear and all arrears thereof then due or which shall afterwards during their or his continuance in

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possession accrue of the same and all costs damages and expenses incurred by reason of the non-payment thereof or the recovering and obtaining payment thereof or otherwise relating thereto."

The usual powers of entry upon the Irish settled estates and of management thereof during a minority and the usual power of sale were given to the applicants.

During the minority of the ninth Duke, who succeeded to the title and settled estates on the death of the eighth Duke on August 18, 1892, the trustees managed the Irish settled estates and kept down all mortgage interest and jointure rent-charges. Subsequently the jointure rent-charge in question fell into arrear for the reasons shortly referred to below and more fully stated in the following judgment.

The ninth Duke attained twenty-one on March 3, 1898, and was thereupon let into possession of the Irish settled estates.

On April 29, 1900, the ninth Duke was adjudicated a bankrupt, and the Earl of Sandwich, who had previously been acting under a family arrangement as receiver of the Irish settled estates, was appointed trustee in the bankruptcy.

On April 10, 1902, the life estate of the ninth Duke in (inter alia) the Irish settled estates was assigned by the Earl of Sandwich to the defendant Consuelo Duchess of Manchester for 9000*l.*, and ultimately it was mortgaged to the Legal and General Life Assurance Society.

On April 11, 1902, the bankruptcy was annulled.

In 1906 Coutts & Co. became mortgagees of the arrears of the jointure rent-charge in question, and in 1908 the jointress assigned the arrears, subject to the mortgage, to the ninth Duke.

The arrears of the jointure rent-charge amounted to about 20,000*l.* and had arisen in consequence of the jointress—who was desirous that her son, the ninth Duke, should reside at Tanderagee Castle, the principal mansion-house on the Irish settled estates, and be enabled to live in a manner befitting his position—having allowed the surplus income of the Irish settled estates to be paid to him or applied for his benefit instead of being applied in keeping down her jointure rent-charge. It was

not, however, suggested that she had done anything to release her rights, or that by her conduct or otherwise she had in any way colluded with the tenant for life so as injuriously to affect the interest of the remainderman.

The trustees took out the present summons consequent upon a request by the tenant for life that they should discharge the arrears out of the capital moneys in their hands.

Jessel, K.C., and *Bryan Farrer*, for the applicants, stated the case.

Astbury, K.C., and *Manby*, for the tenant for life. It cannot be argued that the arrears of the jointure rent-charge are not a direct charge on corpus. They are an existing debt and come within the words "incumbrances affecting the inheritance of the settled land" in s. 21, sub-s. ii., of the Settled Land Act, 1882, and can be discharged out of capital moneys. Possibly a terminable charge cannot be redeemed out of capital moneys under that sub-section, and although the jointure, as such, may not be redeemable because it is terminable, that does not apply to the arrears of the jointure which have become an actual debt.

[EVE J. If the trustees pay off this charge at the direction of the tenant for life under the provisions of sub-s. ii. of s. 21, what jurisdiction has the Court to order him to recoup the money so paid?]

The tenant for life is willing that any order for payment of these arrears shall be entirely without prejudice to any question as to the ultimate liability in respect of these arrears as between tenant for life and remainderman.

P. O. Lawrence, K.C., and *T. T. Methold*, for the jointress. The jointress has never released her jointure and claims all arrears of it. If the settled land had not been sold the jointress would have had to resort to the term and could not have sold the fee under her charge: *Blackburne* v. *Hope-Edwardes* (1); but this land has been sold already, and the reasoning in that case does not apply to this. The capital money is in the hands of the trustees with this incumbrance upon it, and we submit that the

(1) [1901] 1 Ch. 419.

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only thing to be done is for it to be paid off now: *Greatheed* v. *Elliot.* (1) It makes no difference in principle that in both the cases cited the limitation subsequent to the rent-charge and the term for securing the same was a limitation to the settlor in fee simple; the jointure rent-charge came first and was paramount to any remainder.

Stewart-Smith, K.C., and *Warlters Horne*, for the defendants Coutts & Co., and *Bovill*, for the defendants the Legal and General Life Assurance Society, adopted the arguments advanced on behalf of the jointress.

Ingpen, K.C., and *E. Beaumont*, for the infant remainderman. The cases of *Blackburne* v. *Hope-Edwardes* (2) and *Greatheed* v. *Elliot* (1) are distinguishable, because there was no settlement there such as there is here. In each of those cases the remainder subject to the prior rent-charges was limited to the settlor in fee simple, and, that being so, there was no reason why the fee simple should not be sold. But the settlement in the present case creates a strict entail. It is true that the land has been sold, but the proceeds of sale are moneys liable to be invested in land and must therefore be regarded as land.

We submit that the Court has no jurisdiction to order payment of these arrears out of capital moneys under s. 21, sub-s. ii., of the Settled Land Act, 1882. Although the jointure rent-charge is a charge on the inheritance, it is primarily payable out of the annual rents and income; and the proper fund for payment of a terminable charge of this nature is income—*Taylor* v. *Taylor* (3)—and not capital moneys: per Pearson J. in *In re Knatchbull's Settled Estate* (4) and per North J. in *In re Frewen.* (5) The dicta in the two last-named cases shew that a jointure rent-charge is not such an incumbrance as can be discharged out of capital moneys under s. 21, sub-s. ii., of the Act. So to discharge it would be to relieve the tenant for life at the expense of the remainderman. Further we submit that, even if the Court has jurisdiction to order the payment, this is not a case in which the Court, having regard to all the circumstances, will exercise its

(1) (1851) 15 Jur. 986.
(2) [1901] 1 Ch. 419.
(3) (1874) L. R. 17 Eq. 324.
(4) 27 Ch. D. 349.
(5) 38 Ch. D. 383

discretion in favour of the jointress. She has allowed interest on charges upon the Duke's life estate and premiums upon his life policies to be paid before her jointure, and those are facts which the Court will take into consideration. It might give rise to all sorts of unfairness in future if the Court, although not allowing the redemption of a jointure rent-charge out of capital moneys, will nevertheless order payment of arrears of the jointure out of corpus.

EVE J. The first question that arises on this summons is whether the trustees of the settlement in the matter of which it is intituled ought to apply a considerable sum out of capital moneys in their hands in paying to the surviving jointress under the settlement arrears of the jointure rent-charge to which she is entitled.

The capital moneys arise on the sale of certain Irish estates constituting part of the settled estates of the Duke of Manchester. Proceedings to effectuate the sale were commenced in 1904, and, as I understand, were carried to completion, or almost carried to completion, in December last. I say "almost carried to completion" because, according to the evidence, there is still a sum of 10,000*l.* or thereabouts to be received by the trustees.

The sale was made by the present Duke under the provisions of the Irish Land Acts of 1903 and 1904, in exercise of the power of sale vested in him as tenant for life under the settlement to which I have referred. The settlement, which is dated September 7, 1878, was a settlement of the Irish estates subject to overriding charges of a very considerable amount created by prior settlements, and after those overriding charges had been discharged out of the proceeds of the sale there remained a balance of between 60,000*l.* and 70,000*l.*, which, according to the papers before me, was ordered to be paid to the applicants on this summons as trustees of the settlement of 1878 for the purposes of the Settled Land Act. Having received 58,000*l.* odd of the money, they have duly invested it, and there being these capital moneys in hand, the question has been raised whether a sum of 20,000*l.* or thereabouts can be applied thereout in the particular payment I have mentioned.

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By the settlement the Irish settled estate at the material dates stood limited, subject to the paramount incumbrances, to the use that the defendant Consuelo Duchess of Manchester should from and after the death of her husband (which occurred in 1892) receive for her jointure, and in lieu of all dower and freebench, the yearly rent-charge of 2000*l.* during the joint lives of herself and another lady, to be increased on the death of the other lady (which took place in 1907) to 3000*l.* during the residue of her life, the said rent-charge to be payable quarterly as therein mentioned, and to be secured by the powers of distress and entry therein set forth; and subject and charged as aforesaid the estate stood limited to the use of the plaintiffs, the trustees, for a term of 200 years without impeachment of waste upon the trusts thereinafter declared, and subject to the said term and the trusts thereof to the use of the present Duke and his assigns during his life, and after his decease to the use of his first and every other son successively in remainder, one after the other according to their respective seniorities, and the heirs male of their respective bodies, with divers remainders over. Then followed the trusts of the term, which were the usual trusts for securing payment of a rent-charge by entering into possession, by sale of timber or minerals, or by mortgaging the premises.

Down to the year 1898 the rent-charge was paid in full, but since the present Duke came of age in March, 1898, it has fallen into arrear, and at the present time the total arrears amount to a sum approaching 20,000*l.* This state of affairs has been brought about partly by a substantial decrease of the rent roll consequent on legislative revision of the tenancy agreements, partly by the increased burdens imposed on the estates in the shape of rates and taxes, partly by the long delay in the completion of the sales under the Irish Land Acts, and partly by the expenditure for the benefit of the tenant for life, to which I shall have to draw attention by-and-by.

It has not been contended, that having regard to the character of the rent-charge, these arrears did not constitute a charge upon the inheritance, although it has been pointed out that had the property remained unsold the Court would not have ordered a

sale for the purpose of raising the arrears, Buckley J. in *Blackburne* v. *Hope-Edwardes* (1), following *Hall* v. *Hurt* (2), a decision of Wood V.-C., having held that the introduction of the term operates to prevent the Court from making an order for sale of the inheritance at the instance of the person entitled to the arrears. But this is a matter which I need not consider to-day, because, as I have already indicated, the property has already been sold: and the question here is not whether the property should be sold, but whether the proceeds of sale can properly be applied in discharging the arrears.

On behalf of the tenant for life reliance is placed on the order made in *Greatheed* v. *Elliot* (3), where Sir James Parker V.-C. ordered arrears of a jointure charged upon real and other property in St. Vincent, and secured by powers of distress and entry and by a term vested in trustees upon the usual trusts to raise the arrears by sale or mortgage, to be paid out of a fund representing proceeds of sale, observing that, although the Court would not sell the estate at the instance of the annuitant, different considerations arose when part had been sold and there was a fund with which the Court could deal. Counsel for those entitled in remainder point out that in the case cited the estate stood limited, subject to the term for securing the jointure and another term for securing portions, to the settlor in fee, whereas in the case before me the estate subject to the term is strictly settled, and they contend that, having regard to the nature of the charge, "a charge which to all intents and purposes rather affects the tenant for life than the tenant in remainder" (see per Pearson J. in *In re Knatchbull's Settled Estate* (4)), and, further, having regard to the particular facts of this case, the Court either has no jurisdiction to order the payment off of this incumbrance out of the proceeds of sale in the hands of the trustees, or, if it has such jurisdiction, it ought not, in the exercise of its discretion, to order such payment off. Those two points are wholly distinct, and I will deal with them separately.

The question of jurisdiction depends upon the proper construction to be placed upon s. 21, sub-s. ii., of the Settled Land

(1) [1901] 1 Ch. 419.
(2) (1861) 2 J. & H. 76.
(3) 15 Jur. 986.
(4) 27 Ch. D. 349, 353.

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Act, 1882, which deals with the application of capital moneys arising under the Act. By that sub-section capital moneys arising under the Act may be applied "in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land."

On behalf of the remainderman it is urged that the Legislature could not have contemplated payment out of capital moneys of the arrears of an annuity primarily payable out of current rents, and that the effect of holding that capital moneys can be so applied would be to relieve the tenant for life at the expense of the remainderman.

I do not think that is so. One must have regard to the position and rights of the unpaid jointress. It is conceded that so long as the estate remained unsold the arrears were charged thereon, and now that the estate has been sold the charge attaches to the proceeds of sale and the investments representing the same. Such a charge is in my opinion "an incumbrance affecting the inheritance" within the meaning of the sub-section, and I do not appreciate how its discharge out of available capital prejudices the remainderman. On the determination of the life interest he enters into possession either of the whole settled property subject to the charge, or of the surplus of the settled property if the charge has previously been paid off; and having regard to the interest earned by the settled funds and other considerations, I can conceive many cases in which it would be more for the benefit of those entitled in remainder at once to get rid of the charge rather than to allow it to subsist till the tenancy for life is determined.

I think myself it is one of those charges which the Court has jurisdiction to deal with as a charge properly coming within the definition of "an incumbrance affecting the inheritance."

But it is said there are dicta, not actual decisions, in two cases which go to show that in the opinion of the learned judges who gave expression to them the discharge of an incumbrance arising under a jointure rent-charge is not such a payment as can

properly be made under this sub-section. I do not think those dicta, when properly considered, bear that interpretation. They are to be found, the one in *In re Knatchbull's Settled Estate* (1), and the other in *In re Frewen*. (2) In the former case Pearson J. says (3), referring to the sub-section, "No one would contend that under these words a jointure or rent-charge could be bought up. No one could contend that the trustees would be entitled to invest any part of the capital money in relieving the estate of such a charge as that;" and in the latter case North J. says (4): "It is difficult to see how an incumbrance in respect of pin money or a jointure secured by a term could properly be discharged out of capital money arising under the Act."

I think the observations of both learned judges were directed to the redemption of future payments and not to the discharge of accrued arrears, and I come, therefore, to the conclusion that there is no authority which prevents me from directing payment of the arrears out of capital.

Then comes the question whether in this case, having regard to all the circumstances, I ought to exercise my discretion by intimating to the trustees that they ought to act on the request of the tenant for life and discharge the incumbrance here. Looking at the matter first from the point of view of the jointress, in the first place it is not suggested that she has done anything to release her rights; in the next place it is not suggested that by her conduct or otherwise she has in any way colluded with the tenant for life so as injuriously to affect the interest of the remainderman. The story from beginning to end is quite clear. When the Duke came of age he was embarrassed to some extent by debts contracted in his minority. He came into possession of an estate the rent roll of which was decreasing and the unavoidable charges upon which in respect of rates and taxes were increasing. It was obvious that if the jointure was to be kept down and if the security was to be maintained the estates would require very careful administration, and even then little or nothing could be expected in the way of surplus for the tenant for life.

(1) 27 Ch. D. 349.
(2) 38 Ch. D. 383.
(3) 27 Ch. D. 353.
(4) 38 Ch. D. 384.

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In this position, and in view of further pecuniary difficulties in which the Duke was involved from the time of his coming of age, his mother thought that some arrangement ought to be made whereby the management of his estate should be entrusted to a relative of experience, and he should be allowed to reside, at a moderate rate of expenditure, on the family estate in Ireland. This involved the diversion to payments for the benefit of the tenant for life of moneys which would otherwise have been available for keeping down the jointure, but such moneys were very largely applied, first, in keeping up the estate at an expenditure which did not much exceed the expenditure incurred before the Duke was let into possession, and, secondly, in keeping down premiums on policies effected on the Duke's life, which all parties agree ought certainly to be maintained. In short, one cannot read the evidence without seeing that all parties have combined to do their best in a very difficult position, and that in so far as the tenant for life has benefited from income which would otherwise have been available for keeping down this jointure he has so benefited in consequence of the desire of his mother and other relatives that he should be extricated from his pecuniary embarrassments and be able to live in something befitting the position he had a right to expect he would occupy.

In the absence of any release or collusion on the part of the jointress ought I to say that her forbearance to go into possession or to enforce her security in the circumstances I have indicated disentitles her to payment now that there is a fund available? I cannot help thinking that if I leave this charge subsisting I shall aggravate the position for the jointress and her assignees and the Duke without advantage to the remainderman, and I do not propose to do that.

If in the administration of this estate it becomes necessary to consider the proper apportionment of the liability in respect of these arrears as between tenant for life and remainderman, the point which I am determining to-day is, according to the concession of the Duke himself, not to prejudice the full discussion of that question. In saying that, I do not want to convey to the remainderman that the Duke, still less his assignees, are to be treated as giving up any argument that they may have on

the law or on the facts entitling them to say that the Duke is not liable to recoup the capital.

All I am saying is that at the present neither one way nor the other do I wish to prejudice that question; the matter is left entirely open; but on the facts of this case, exercising the discretion which is vested in me, having come to the conclusion that such a discretion is vested in me, I have come to the further conclusion that the wisest possible course is at once, at the earliest possible date, to clear off the charge which has attached to these principal moneys by reason of the jointure rent-charge having fallen into arrear; and accordingly I intimate to the trustees that they ought to act on the request of the tenant for life, and out of the capital moneys in their hands to discharge all arrears of the jointure rent-charge due to the Duchess Consuelo down to the date of such payment, and such payment will be made without prejudice to any question as to how and by whom and out of what fund such arrears ought ultimately to be borne.

Solicitors: *Nicholl, Manisty & Co.; Boxall & Boxall; Rawle, Johnstone & Co.; Farrer & Co.; Lawrence, Graham & Co.*

R. M.

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1909

May 7, 10, 11, 12, 13, 14, 17, 18, 19, 20; *June* 15.

In re JOSEPH CROSFIELD & SONS, LIMITED.

Trade Mark—Registration—Distinctive Mark—"Perfection"—"Adapted to distinguish"—User—Evidence—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *sub-s.* 5.

The word "Perfection" applied to soap is prima facie not a distinctive mark or "adapted to distinguish" the goods of the proprietor of the mark from those of other persons so as to be capable of registration as a trade mark under s. 9, sub-s. 5, of the Trade Marks Act, 1905.

Evidence that the user of the word as a trade mark has rendered it in fact distinctive of the proprietor's goods to many persons in certain large areas of the United Kingdom, but not to many other persons in those areas, and to scarcely any one outside those areas, is not sufficient to make the mark "distinctive" or "adapted to distinguish" within the section.

MOTION.

On April 9, 1907, the applicants made a special application under s. 9, sub-s. 5, of the Trade Marks Act, 1905, for the registration of the word "Perfection" in class 47 as a trade mark for common soap. The application followed Form T M 5 of the Trade Marks Rules, 1906.

On August 2, 1907, the applicants obtained an ex parte order from the Board of Trade determining that the registrar should proceed with the registration.

The registration was opposed by Lever Brothers, Limited. They did not object to the registration of "Crosfield's Perfection," but contended (inter alia) that the word "Perfection" alone was not distinctive or adapted to distinguish the applicants' soap from that of other manufacturers, but was a commendatory and descriptive word and in common use in the trade.

Up to January 1, 1907, the applicants had used the word "Perfection" in conjunction with their name and two pyramids, with a caution stating that every genuine tablet of the soap bore the name and pyramids.

The applicants, however, gave a considerable amount of evidence with the view of shewing that the word "Perfection"

alone had come to denote their soap exclusively over a large extent of England and Wales and in fact distinguished their soap from that of other persons. On this assumption they contended that the word "Perfection," having regard to the evidence of user, was "adapted to distinguish" their soap from that of other persons within s. 9, sub-s. 5, of the Trade Marks Act, 1905 (1), and ought to be registered as a distinctive mark.

The opponents gave evidence in opposition.

The registrar refused the application.

The applicants appealed to the Court, and the motion was heard with witnesses before Swinfen Eady J., who ultimately refused the application in a reserved and written judgment wherein the complete facts and the result of the evidence are fully stated and commented on.

Walter, K.C., *Kerly*, *J. H. M. Ryan*, and *Moulton*, for the applicants.

(1) The Trade Marks Act, 1905, provides (inter alia) as follows:

Sect. 9. "A registrable trade mark must contain or consist of at least one of the following essential particulars:—

"(1.) The name of a company, individual, or firm represented in a special or particular manner;

"(2.) The signature of the applicant for registration or some predecessor in his business;

"(3.) An invented word or invented words;

"(4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

"(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.), and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark:

. . . . . .

"For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

"In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

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Astbury, K.C., J. Cutler, K.C., and *Sebastian,* for the opponents. *Sargant,* for the registrar.

Cur. adv. vult.

June 15. SWINFEN EADY J. This is an appeal by Joseph Crosfield & Sons, Limited, from a decision of the Registrar of Trade Marks refusing to register the word "Perfection" as the applicants' trade mark in class 47 for common soap.

The registration is opposed by Messrs. Lever Brothers, Limited, who object to the registration of the word "Perfection" alone. They do not object to the registration of "Crosfield's Perfection," but they contend, amongst other things, that the word "Perfection" alone is not "distinctive"; that it is not adapted to distinguish the goods of Messrs. Crosfield from the goods of other manufacturers; that the word is merely commendatory or indicative of the character or quality of the goods and is descriptive; that the word has long been in common use in the soap trade; and that if the applicants are permitted to register the word they will thereby secure an unfair advantage over their competitors in business.

It appears that many years ago, in May, 1886, the applicants applied to register the word "Perfection," and endeavoured to obtain the consent of Messrs. Lever to that registration, but Messrs. Lever refused their consent on the ground that the word was one to which no one could claim an exclusive right, and the registration was not effected.

The Trade Marks Act then in force differed, however, from the Act of 1905, and the applicants contend that they are now entitled to register by reason of the alteration in the law effected by that Act. It is represented that this case may govern many others, as although in form it is limited to the one word "Perfection," yet the counsel for the applicants said that they could not distinguish it in principle from the names of other soaps, about which much evidence was adduced, and the proprietors of which were called, namely, "Watson's Matchless Cleanser," "Gossage's Magical," "Knight's Quick Washer," "Thomas's Perfect Cleanser," and others, and as to which applications to register the words as trade marks (without the

makers' names) will probably be made if this application succeeds.

The applicants are a limited company registered in the year 1896 to acquire the business of an old-established firm of the same name which was founded about the year 1815. Amongst other soaps the old firm manufactured a soap in bars, which they called and entered in their price lists as "Crosfield's Perfection Pale." The price lists from 1878 to 1882 are in evidence and contain this item, but the price lists from 1882 to 1887 have been lost or mislaid and are not forthcoming.

Up to the year 1885 household soap was always sold in bars, but in that year the practice commenced of selling it in tablets as well, and this practice has continued ever since. The tablets are usually 1 lb. in weight, of oblong shape, with an indentation in the middle, at which place the tablet is readily divisible into two halves. From the year 1885 the applicants ceased selling in bars the soap which they called "Crosfield's Perfection Pale." They put it up in tablets, six inches long and two and a quarter inches wide. Every tablet contained on one side the words and figures: "No. 1" (in a circle). "Crosfield's 'Perfection' Washing Soap. The Wonder Worker," and the initials of the firm in a monogram within two concentric circles. On the other side were the words: "Caution. Every genuine tablet is stamped thus—with two pyramids," and there were two representations of a pyramid, one on each half of the tablet, occupying more than half the width, and about two-thirds of the length of each half tablet, with three small representations of a hand pointing to the pyramids. After the registration of the company the letters "Ld." were added to the initials of the firm within the circles, but, with that slight alteration, every single tablet of the soap which is the subject of this application, sold between 1885, when tablets were first introduced, and January 1, 1907, was stamped in the way I have described.

These tablets were enclosed in paper wrappers. From 1885 to April, 1904, the upper surface of the wrapper in which the soap was enclosed was printed in exactly the same manner as one side of the soap, namely, "No. 1. Crosfield's Perfection Soap. The Wonder Worker," and the initials of the firm or

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company. In April, 1904, the words "British manufacture" were added to the wrapper, and in the autumn of 1904 the word "Crosfield's" was omitted from the upper surface of the wrapper, but the name and address of the firm always appeared in at least one place on the wrapper. The applicants produced a bundle of all the wrappers which have from time to time been used by them, reprinted from the original plates still in their possession (Exhibit H. K. 7). From this bundle it appears that there was only one wrapper in use for this soap before the formation of the limited company, and that, in addition to the printed matter on the upper surface of it, such wrapper also contained, on one side of it, a pictorial representation of two pyramids about the same size as on the soap itself, with the words "Trade Mark, Registered. Beware of imitations. Every genuine tablet is stamped thus—with two pyramids," and also a notice that "each tablet . . . . bears the name of Crosfield."

As from January 1, 1907, certain alterations were made in the tablet and wrapper, consequent upon obtaining an appointment as soapmakers to the King. On one side of the tablet appear the words "Perfection. By appointment, soapmakers to His Majesty the King," together with a representation of the Royal arms. On the other side of the tablet appear the two pyramids, but much smaller than previously, with the words "Pyramid Trade Mark. Crosfield's, Warrington." The wrapper also has the Royal arms. A carton is now used, and this has the words "Perfection Soap, the Wonder Worker," with a pyramid and the words "Trade Mark."

Under the Trade Marks Act, 1905, s. 9, a registrable trade mark must contain or consist of at least one of certain essential particulars. The word "Perfection" does not come within sub-ss. 1, 2, or 3 of s. 9. Sub-section 4 is "A word or words having no direct reference to the character or quality of the goods . . . ". The word "Perfection" does not come within this sub-section, as it manifestly has a direct reference to the quality of the goods. Indeed, a recent advertisement of the applicants in the *Daily Mail* of August 17, 1908 (Exhibit J. J. C. 13), was produced containing these words: "Perfection is the finest pale household soap before the public, and worthy

of its name on every point of excellence." "Perfection" on soap certainly means that the soap is a perfect soap, or the perfection of soaps. Sub-section 5 of s. 9 is "Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1), (2), (3), and (4), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark." The Act then provides that "for the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

The applicants have adduced a great deal of evidence. They claim that this evidence establishes that the word "Perfection" has been a trade mark in actual use by them, and that the user has rendered the trade mark in fact distinctive for the soap in question throughout a large part of England and Wales, and that when once this is established the Court must find that it is "adapted to distinguish," however unsuitable or ill-adapted for that purpose it would prima facie appear to be.

The applicants applied for registration on April 9, 1907, and they obtained ex parte from the Board of Trade an order under s. 9, sub-s. 5, dated August 2, 1907, determining that the Registrar of Trade Marks do proceed with the registration of the said trade mark. Unfortunately, in the evidence put before the Board of Trade a very serious slip was made with regard to the packet of soap exhibited. The opponents quite accepted the view that this slip was accidental, but nevertheless insisted that the Board of Trade were seriously misled by it. I only mention this because it was at first contended before me that the order of the Board of Trade directing the registrar to proceed was conclusive that the word was "adapted to distinguish." This point, however, was formally abandoned during the hearing of the case, so that it is not necessary for me to refer any further to the order of the Board of Trade.

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Now the matter which I have to determine is whether the word "Perfection" alone is "adapted to distinguish" the common soap of Messrs. Crosfield from the common soap of other persons, manufacturers, or dealers.

Considering the word by itself and apart from any evidence of user by the applicants, it is quite clear that it is wholly unsuitable for the purpose; it is an ordinary English word, expressive of the highest quality, extensively used by the mercantile community to describe and recommend their goods, and where the goods of many manufacturers are of equal quality the word is entirely unsuitable for the purpose of indicating exclusively the goods of one manufacturer; it is not in the least calculated to distinguish the goods to which it is applied as those made or sold by one person more than another.

Moreover, it may be positively misleading, if in process of time a method of making some vastly superior soap be discovered or invented by some manufacturer, and that soap much more nearly attains perfection than that of Messrs. Crosfield. If, therefore, the question whether the word "Perfection" is distinctive as applied to common soap were to be determined without reference to any evidence of user, I should certainly answer the question in the negative.

With regard to the evidence, many witnesses were called and examined; the applicants also formally put in some 500 declarations which were before the registrar. These are mostly in one or the other of two forms, one form being made by wholesale grocers and dealers, and the other form by retail grocers and dealers, in many cases the same individual, if both a wholesale and retail dealer, making both declarations. Neither form of declaration, although made by so large a number of persons, is really accurate. Thus the wholesale form, par. 8, says "The applicants have had the exclusive use of the word 'Perfection' as a trade mark for soap for many years past." The retail form, par. 2, says "I have known the applicants' soap under their well-known 'Perfection' trade mark for the past thirty years" or as the case may be.

Now the truth is that down to January, 1907, every tablet of the soap had been marked "Crosfield's Perfection Washing Soap,"

and the word "Perfection" had never been used alone on the goods, but always in connection with the word "Crosfield's." It was urged that the exclusive right to the use of a word as a trade mark is not lost by the manufacturer habitually using it in conjunction with his own name as maker of the article, and the applicants relied upon the cases of *Ford* v. *Foster* (1), "Ford's Eureka Shirt," and *Montgomery* v. *Thompson* (2), "Joule's Stone Ales" and "Joule's Stone Ale," a case of fraudulent passing off. Where, however, the word taken by the manufacturer is not an invented word, nor a word having no direct reference to the character or quality of the goods, and is habitually used in conjunction with the trader's own name, this conjoined user renders it increasingly difficult for him to establish that the word alone is distinctive.

The applicants, however, established by their evidence that in a considerable part of England, especially Lancashire, Yorkshire, and the Midlands, and in many parts of Wales, to a large number of persons their "Perfection soap" means and indicates Crosfield's Perfection soap, and no other, and that it is very largely ordered and entered in trade lists as "Perfection soap," without any reference to the name of "Crosfield." On the other hand, in other parts of England, more especially in the south and south-west, and particularly in Cornwall and Devon, and also in Scotland and Ireland, the applicants' "Perfection soap" is almost entirely unknown, and an order for "Perfection soap" would very rarely, if at all, convey the meaning that it was the applicants' soap which was required, or, indeed, that it was the soap of any particular manufacturer.

About the latter end of 1906 or the beginning of 1907 the applicants started advertising their soap in the newspapers. This was a new departure for them. Mr. Crosfield said that last year (1908) their trade shewed an exceptionally large increase, and that their soap was pushed by means of travellers and advertisements in districts where it was not known previously; and certainly many persons called as witnesses who do not stock or sell Crosfield's Perfection soap had heard of it, and in some cases through these advertisements, and when asked for

(1) (1872) L. R. 7 Ch. 611. (2) [1891] A. C. 217.

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"Perfection soap" would know that Crosfield's soap was meant and would say that they did not keep it.

The opponents called evidence which established that in many parts of England where the applicants' soap is well known and extensively sold it is usually asked for as "Crosfield's Perfection," and not as "Perfection" only. Thus, Mr. George Wall, of Liverpool, a managing director of Lovell & Christmas, Limited, said that his company are large wholesale dealers, with from 3000 to 4000 retail traders as their customers; they have dealt in Crosfield's Perfection soap for a great many years, and yet to the best of his knowledge they had never received a single order for "Perfection soap" without its also being described as Crosfield's.

It is doubtless the fact that in numberless cases the soap is ordered as "Crosfield's Perfection soap," and in numberless other cases ordered as "Perfection soap." I must, however, point out that many witnesses called for the applicants stated that in the places from which they came and of which they spoke the soap in question was constantly ordered in a still more abbreviated manner. Thus, the word "soap" was dropped, and the orders were simply for so much "Perfection" without other additions, i.e., without the word "soap" being used; sometimes for "Perf. soap," or "Per. soap," or sometimes "P. soap." Probably the better the soap is known in any particular district, or the more extensively it is sold or used by the person ordering it, the shorter the description of it is abbreviated.

But this considerably detracts from the weight of the evidence that the word "Perfection" is sufficient to distinguish Messrs. Crosfield's soap. It is putting the word upon the same level as the abbreviations of it, such as "Perf. soap," "Per. soap," "P. soap." No doubt to a limited number of persons who only deal in certain makes of soap, and to persons who only use very few kinds of soap, even "P. soap" may be sufficient, as between those persons, to indicate that the buyer desires Crosfield's Perfection washing soap. But such abbreviation would obviously not be sufficient even to distinguish it from the "Perfect Washer" of one maker or the "Perfect Cleanser" of another. One witness (Mr. Franks, of Nottingham), who said

that if "P." soap were ordered he should understand by it Crosfield's Perfection washing soap, also said that if "M." soap were ordered he should understand Watson's Matchless Cleanser was wanted; he was then asked why it would not be Gossage's "Magical" soap, and his only answer was that they would send "Matchless," as they sold a ton of "Matchless" to a hundredweight of "Magical." Probably by a person who sold, or in a district where was sold, more "Magical" than "Matchless" soap an order for "M." soap would be understood as meaning Gossage's "Magical" and not Watson's "Matchless" Cleanser.

Moreover, there was evidence that persons, although ordering the soap as "Crosfield's Perfection" or merely as "Perfection" soap, looked to see that both the name "Crosfield" and the pyramid trade mark were on the soap supplied before they were satisfied that they had obtained the applicants' soap which they wanted. It was urged that this evidence was not reliable, but I am satisfied that it was. Indeed it would be strange if some customers did not scrutinize the tablets to see that the pyramid trade mark was there, when every tablet of the hundreds of thousands sold had impressed upon it this: "Caution. Every genuine tablet is stamped thus—with two pyramids."

The opponents put in many statutory declarations, but these are for the most part argumentative, giving reasons why in the opinion of the deponents the word "Perfection" should not be registered as the trade mark of any single manufacturer. The opponents also called many witnesses who certainly established that in many parts of the United Kingdom Crosfield's "Perfection" washing soap is not known at all. They also adduced evidence shewing that other soap was also known either as "Perfection soap" or "The Perfect soap."

Mr. Beulah, of Boston, who supplies from 600 to 800 retail shops, for many years sold a soap of his own called "The Perfect soap." He now calls it "Happy Tidings—the Perfect soap," and it is still known as "The Perfect soap" among people who have been accustomed to buy it.

Mr. Gardner, of Regent Street, London, for seventeen years has sold a soap which he has advertised as Gardner's "Perfection" toilet soap and as Gardner's "Perfection" soap. It is ordered from

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him as "Perfection" soap. It is an expensive soap used for toilet purposes. It was urged that this article came under class 48, "Perfumery," which includes perfumed soap, and not under class 47, which is limited to common soap. But both articles are soap, and the fact that they may happen to be included in different classes is not sufficient to prevent confusion by the public, where the articles are similar in kind and useful for many purposes in common; common soap is doubtless used by a very large number of people for toilet purposes.

Another witness, Mrs. Gibson, went round to certain shops near London, asking at each for "Perfection" soap, these shops not being selected in any way. At one shop, in answer to her demand for "Perfection" soap, she was supplied with Watson's "Matchless Cleanser," which the shopkeeper apparently thought was Perfection soap. At another shop she was supplied with John Knight's toilet soap, which the proprietor said was perfection. In some of the other shops she was told that they did not know any soap by the name of "Perfection." Not one of the eleven shops she visited supplied Crosfield's "Perfection" soap in response to her application for "Perfection soap."

In considering the question of the extent to which any user may have rendered any trade mark distinctive it must be borne in mind that registration of a trade mark under the Act confers the exclusive right to the use of the trade mark in Scotland and Ireland as well as in England and Wales; and the burden of establishing that the mark is distinctive becomes the greater when the word selected is of simple, plain, and easy meaning, well known to everybody, and in general use as a descriptive word in the very trade in which it is sought by registration to monopolize its use as a trade mark. Perhaps no word in the English language is in more general use than the word "perfection" in connection with goods. Exhibit A to Mr. Lever's declaration of December 28, 1907, gives numerous instances of this user. We find there the labels of "Perfection bacon," "Perfection flour," "Perfection coffee," "Perfection Edinburgh rock," "Perfection toffee," and very many others.

The result of the evidence is that in some counties of England and Wales "Perfection" soap to many people indicates

Crosfield's "Perfection" washing soap; to many other persons in the same counties it does not convey any such meaning; and in some counties it scarcely indicates the applicants' soap to any one, as it is almost unknown in the county. The applicants' soap is only little known in London. In Scotland and Ireland it does not indicate or distinguish the applicants' soap from that of other manufacturers to any appreciable extent, if at all.

Considering the evidence as a whole, I have come to the conclusion that the word "Perfection" is not a distinctive mark and is not adapted to distinguish the goods of the applicants from the goods of other persons. I have taken into consideration the evidence of user, and still am of opinion that the word is not adapted to distinguish the goods of the applicants. In my opinion the word "Perfection" is not a distinctive mark within paragraph or sub-s. 5 of s. 9 of the Act of 1905, notwithstanding the user of the word by the applicants in the past.

The conclusion to which I have come will not, of course, affect the applicants' pyramid trade mark, nor prevent the applicants from preventing other persons from passing off their soap as that of the applicants. Indeed, s. 45 of the Act of 1905 sets at rest any doubt which might have arisen under s. 42 of the Act by providing that "nothing in the Act contained shall be deemed to affect rights of action against any person for passing off goods as those of another person or the remedies in respect thereof." My decision merely prevents the applicants from monopolizing the word "Perfection" as a trade mark for their soap. I refuse the application with costs, and the applicants must also pay the costs of the registrar.

Solicitors: *C. Urquhart Fisher & Co., for Alexander Wilson & Cowie, Liverpool; Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool; Solicitor to the Board of Trade.*

G. R. A.

C. A.
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Oct. 27, 28, 29, 30; Nov. 3, 18.

In re JOSEPH CROSFIELD & SONS, LIMITED.

In re CALIFORNIA FIG SYRUP COMPANY.

In re H. N. BROCK & CO., LIMITED.

Trade Mark—Registration—Special Application—Distinctive Word—User—Laudatory Epithet—Geographical Name—Misspelling of Descriptive Word—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *sub-s.* 5; *ss.* 11, 44.

A mere laudatory epithet cannot acquire by user the quality of distinctiveness within s. 9, sub-s. 5, of the Trade Marks Act, 1905, so as to render it capable of registration as a trade mark.

A word not being an invented word ought not to be put on the register if the spelling is phonetic and resembles in sound a word which in its proper spelling could not be put on the register.

Per Fletcher Moulton L.J.: The Court has jurisdiction under s. 9, sub-s. 5, to permit registration of words having a direct reference to the character or quality of the goods, as well as geographical terms, but it is for the applicant to prove that words prima facie unsuitable for registration have acquired distinctiveness, and the extent to which the Court will require the proof of this acquired distinctiveness to go will depend upon the character of the word. In determining whether a word prima facie descriptive ought to be admitted to registration as a trade mark the Court ought to consider whether the registration will cause substantial difficulty or confusion in view of the provision in s. 44 that no registration shall interfere with the use by any person of any bona fide description of the character or quality of his goods.

Upon a special application to register the word "Perfection" as a trade mark for common soap it was proved that for many years past the applicants had advertised their soap under that name, and had also used the name upon the cakes of soap sold by them, but always in conjunction with their own name and that in many parts of England the applicants' soap had become known to a large extent as "Perfection" soap.

Held, that the word ought not to be admitted to registration.

Decision of Swinfen Eady J., ante, p. 118, affirmed.

A special application to register the words "California Syrup of Figs" for an aperient medicine was referred by the Board of Trade to the Court. The evidence established a prima facie case of the words having become identified by long user with the goods of the applicant:—

Held, that the application ought to be allowed to proceed.

Decision of Warrington J., [1909] 2 Ch. 99, reversed.

An application was made to expunge from the register several trade marks consisting of the word "Orlwoola," registered under the Patents, Designs, and Trade Marks Acts, 1883 and 1888, for (amongst other things) woollen goods, with a disclaimer in each case of the words

"all wool." These marks had been extensively used for many years in connection with unshrinkable woollen goods:—

Held, that "Orlwoola" was merely a misspelling of "all wool"; that if the goods to which the word was applied were entirely composed of wool the word was descriptive, and, if not, was deceptive; and that the trade marks were not registrable either under the Act of 1905 or under the previous Acts and ought to be expunged.

Decision of Eve J. reversed.

THESE three appeals raised questions upon the construction of s. 9, sub-s. 5, of the Trade Marks Act, 1905. (1)

IN RE JOSEPH CROSFIELD & SONS, LIMITED.

This was an appeal from a decision of Swinfen Eady J. (2)

On April 9, 1907, Joseph Crosfield & Sons, Limited, made a special application (No. 291,978) under s. 9, sub-s. 5, of the Trade Marks Act, 1905, to register the word "Perfection" as a trade mark in class 47 for common soap, and on August 2, 1907,

(1) The Trade Marks Act, 1905, provides:

Sect. 9. "A registrable trade mark must contain or consist of at least one of the following essential particulars:—

"(1.) The name of a company, individual, or firm represented in a special or particular manner;

"(2.) The signature of the applicant for registration or some predecessor in his business;

"(3.) An invented word or invented words;

"(4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

"(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.), and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark:

. . . . .

"For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

"In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

Sect. 44. "No registration under this Act shall interfere with any bona fide use by a person of his own name or place of business or that of any of his predecessors in business, or the use by any person of any bona fide description of the character or quality of his goods."

(2) Ante, p. 118.

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the Board of Trade directed the registrar to proceed with the registration. The application having been advertised, it was opposed by Lever Brothers, Limited, a rival firm of soap manufacturers, mainly on the ground that the word was solely commendatory and was not distinctive of the applicants' goods. The evidence shewed that for thirty years past the word "Perfection" had been extensively used by the applicants as a trade mark for soap; that in some parts of the country the word had become to a large extent identified with the applicants' soap; but that in other parts of the country it did not indicate that the soap was of any particular manufacture. It further appeared that until 1905 the word "Perfection" was always used by the applicants in conjunction with their name. Since that time the word had in some cases been used alone upon the wrappers, but the mode of user upon the cakes of soap continued as before. The registrar refused registration, and his decision was affirmed by Swinfen Eady J.

The applicants appealed.

Walter, K.C., and *Kerly*, for the appellants. The evidence established that for a great many years the word "Perfection" has been extensively used by the appellants as a trade mark for household soap; that over the greater part of England the appellants' soap is known as "Perfection," and that "Perfection" is recognized as a brand in the trade and by a great part of the public; that during the whole of this period no other person has ever wanted to use this word as a trade mark for soap; and that no confusion has arisen from the appellants' user of the word. The word from long user has in fact become distinctive of the appellants' goods and is adapted to distinguish them. It is therefore registrable under s. 9, sub-s. 5, of the Trade Marks Act, 1905. So completely has the word come to be identified with the appellants' goods that the use of it by any other trader as a trade mark for soap must be deceptive, and it cannot be in the public interest to refuse registration to a word where the only effect of such refusal would be to encourage deception. It may be said that if a word is descriptive it cannot be distinctive, but the authorities shew the contrary; and the

appellants are not seeking to prevent other traders from using the word "Perfection" as descriptive of their goods; they only seek to restrain the use of it as a trade mark: *Montgomery* v. *Thompson* (1); *Powell* v. *Birmingham Vinegar Brewery Co.* (2); *Reddaway* v. *Banham* (3); *Cellular Clothing Co.* v. *Maxton & Murray.* (4) The fact that the appellants have generally used their own name in conjunction with the word "Perfection" is no objection to their claim: *Ford* v. *Foster.* (5) The cases decided upon s. 9, sub-s. 5, of the Act of 1905 are *In re National Starch Co.'s Application* (6); *In re Royal Worcester Corset Co.'s Application* (7); *In re Bowden's Patent Syndicate* (8); *In re California Fig Syrup Co.'s Application* (9); *In re H. N. Brock & Co.* (10); *In re Whitfields Bedsteads Application* (11); *In re Apollinaris Trade Mark.* (12)

Astbury, K.C., and *Sebastian*, for the respondents. "Adapted to distinguish" means adapted to do something which is not describing. A word like "perfect" or "perfection" or "best quality" is a kind of word which can never become distinctive. Suppose a man said "All the soap sold in this shop is perfection," it could not be said that that denoted the appellants' soap. It is said that no one else has used the word as a trade mark for soap, but the reason is that it is such an unsuitable word. Moreover, the appellants' soap is always stamped "Crosfield's Perfection Soap." Sect. 11 is of importance. This word is calculated to deceive if it will stop traders using such a word as "perfect." This is a matter within the discretion of the Court, and the fact that this word may be applied to soap which is very bad is a circumstance to be taken into account in considering whether the Court ought to exercise its discretion. The appellants have chosen this word because of the advantage to be derived from its meaning. The word sought to be registered in this case is of a totally different character from

(1) [1891] A. C. 217, 220.
(2) [1896] 2 Ch. 54; [1897] A. C. 710.
(3) [1896] A. C. 199.
(4) [1899] A. C. 326, 335.
(5) (1872) L. R. 7 Ch. 611, 629.
(6) [1908] 2 Ch. 698; 25 Rep. Pat. Cas. 802.
(7) [1909] 1 Ch. 459.
(8) (1909) 26 Rep. Pat. Cas. 205.
(9) [1909] 2 Ch. 99.
(10) (1909) 26 Rep. Pat. Cas. 681.
(11) [1909] 2 Ch. 373.
(12) [1907] 2 Ch. 178.

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the words in the "Oswego" case (*In re National Starch Co.'s Application* (1)), and the "California" case (*In re California Fig Syrup Co.'s Application* (2)). As to *Ford* v. *Foster* (3), there is no analogy between a trader using his name in connection with a fancy word like "Eureka" and using it in connection with such a common word as this. Given a common word which anybody may use, it is the fact of the addition of the maker's name only which gives it any distinctive meaning: *Hommel* v. *Bauer & Co.* (4); *Richards* v. *Butcher.* (5) The more commonly descriptive the word is, the more important is the statement who the maker is. Then as to universality: the evidence must be such that the Court can infer universality in the sense that the secondary meaning which the word has acquired in one place will prevail everywhere. For the appellants to succeed, a word such as this, which every trader would naturally use, must have a universal secondary meaning, because otherwise it is not distinctive. "Adapted to distinguish" implies that you must first examine the character of the word and see whether it can be adapted to distinguish, and then consider the evidence of user. There are many degrees of descriptiveness, and if a word is only slightly descriptive very little evidence may suffice, but a simple word of quality cannot become distinctive, if at all, without the strongest evidence of user. When a trader puts a combination of indicia upon his goods he means the whole combination to represent that the goods are his goods.

Sargant, for the registrar. In considering applications under this sub-s. 5 the Court must look beyond the interests of the parties and consider how the registration will affect the interests of the trading community generally. A trade mark ought to have a perfect denotation as denoting the origin of the goods; it ought to have no connotation at all. Good examples of such trade marks are Allsopp's device of an uplifted hand and the Liebig Company's word mark "Lemco." The report of Lord Herschell's committee shows the principles which ought to be followed in permitting the registration of words as trade marks. It is there

(1) [1908] 2 Ch. 698; 25 Rep. Pat. Cas. 802.
(2) [1909] 2 Ch. 99.
(3) L. R. 7 Ch. 611.
(4) (1904) 22 Rep. Pat. Cas. 43, 47.
(5) [1891] 2 Ch. 522.

said that no one ought to be granted the exclusive use of a word descriptive of the quality or character of any goods, because descriptive words are the property of all mankind, and it would not be right to allow any individual to monopolize them. The history of the Trade Marks Acts is instructive on this point. Under the Act of 1875 no new words were allowed registration. Under the Act of 1883 fancy words not in common use were admissible. Under the Act of 1888 the use of the term "fancy word" was abolished and "invented words or words having no reference to the character or quality of the goods" were substituted. This has been still further relaxed by the Act of 1905, which permits the registration of words having no "direct" reference to character or quality, and also, by sub-s. 5, any other distinctive words upon obtaining an order from the Board of Trade. I do not dispute that the terms "descriptive" and "distinctive" overlap, but there are some words so simply descriptive of quality that no amount of user can make them distinctive; and in this connection it is important to bear in mind s. 41, which provides that after seven years the title of the registered proprietor cannot be impeached, no matter how bad the mark may be. Further, a word of commendation such as "perfection" is calculated to deceive, since it might be applied to soap of an inferior quality.

Walter, K.C., in reply, referred to *Perry Davis & Son* v. *Harbord*. (1)

Cur. adv. vult.

H. B. H.

IN RE CALIFORNIA FIG SYRUP COMPANY.

This was an appeal from a decision of Warrington J. (2) On August 29, 1908, the California Fig Syrup Company made a special application (No. 305,877) to register the words "California Syrup of Figs" as a trade mark in class 3 in respect of "a medicinal preparation of syrup of figs for human use." The Board of Trade referred the application to the Court. The applicants were an American company carrying on business at San Francisco, in California, with distributing agents in the

(1) (1890) 15 App. Cas. 316, 321. (2) [1909] 2 Ch. 99.

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United Kingdom and elsewhere. The evidence shewed that about twelve or thirteen years prior to the application the applicants introduced their preparation into England, and that since that time they had continuously sold it in this country under the name which they now sought to register. The name was on the bottles in which the preparation was sold and it was used in advertisements which had been extensively issued by the applicants.

The result of the evidence, which was undisputed, was that the words "California Syrup of Figs" did at the present time distinguish the applicants' preparation from preparations of a similar nature made and sold in England by other manufacturers. Warrington J. held that the words were not adapted to distinguish the applicants' goods from those of other manufacturers and were consequently not registrable under s. 9, sub-s. 5, and he refused the application.

The applicants appealed.

Astbury, K.C., and *Sebastian*, for the appellants. We agree that for a mark to come within s. 9, sub-s. 5, it must be distinctive, but under that sub-section two hearings are involved, and this Court only has to determine whether the mark is registrable. If that question is decided in the affirmative, the registrar has to decide whether it ought to be registered or not, and the discretion vested in him is different from that given to the Court by sub-s. 5. If the mark is not within the first four sub-sections, it can only be registered if the Court holds that it is registrable, but a holding to that effect does not ensure its registration. The owner is in that case no better off, then, than if the mark had come within one of the first four sub-sections. The form of application under sub-s. 5, as prescribed by r. 35 of the Trade Marks Rules, 1906, and Form T M No. 5 of the schedule to those rules, is wrong; it asks for an order directing registration, and it is addressed to the registrar. The order of the Court is in the nature of a rule nisi, not a decision on the merits. An opponent can only appear by leave. The question is whether the word never can be distinctive, or whether it is such a word as may be shewn by evidence to be distinctive. It was admitted in the Court

below that at the present time this mark is distinctive, that the words "California Syrup of Figs" did distinguish our goods, and the respondents contend that Warrington J. was entitled to take the place of the registrar and stop all further discussion in spite of that admission. But the learned judge had no right to do more than say that it was or was not distinctive, and he held that it was. Other questions were for the registrar to determine. The words "adapted to distinguish" were introduced in order to enlarge the scope of the word "distinctive," not to reduce it. If the mark is distinctive at the present time, that is all that is necessary: the possible result in the future is immaterial. [They referred to *Orr Ewing* v. *Registrar of Trade Marks.* (1)]

Sargant, for the registrar. The Court has to protect the commerce of the future as well as that of the present. The words "adapted to distinguish" do not mean capable of distinguishing, but suitable to distinguish; and evidence of user is a test of suitability. If they meant "capable," the discretion of the Court would be swept away, and the mark would have to be considered distinctive the moment it was shewn that it did in fact distinguish the proprietor's goods. "Syrup of figs" is a generic term and is the only expression which denotes the article. "California" is the only distinctive word in the mark, and it is the well-known geographical name of a large territory. "Oswego," on the other hand, was known to very few people and would not be so likely to cause confusion. If this mark is allowed to proceed the opponents may be bought off, and other traders will be prejudiced in the future. That confusion is probable is shewn by *California Fig Syrup Co.* v. *Taylor's Drug Co.* (2) [He also relied on his argument in *In re Joseph Crosfield & Sons.* (3)]

Astbury, K.C., in reply.

Cur. adv. vult.

H. C. R.

IN RE H. N. BROCK & CO., LIMITED.

This was an appeal from a decision of Eve J.

In 1909 H. N. Brock & Co. moved to rectify the register of trade marks by removing therefrom four trade marks registered

(1) (1879) 4 App. Cas. 479. (2) (1897) 14 Rep. Pat. Cas. 341,
(3) Ante, p. 134.

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under the Patents, Designs, and Trade Marks Acts, 1883—1888, in 1899 and 1900, in classes 34, 33, 35, and 38, and numbered respectively 224,722, 230,405, 230,406, and 230,407.

In each case the mark consisted of the word "Orlwoola," and in each case the registration was accompanied by a disclaimer of the exclusive right to the use of the words "all wool." The registration was obtained by Orlwoola, Limited, a company formed in 1898 to take over the business of a private firm trading under the style of the Orlwoola Company in unshrinkable woollen materials known as "Orlwoolas." In 1901 the business of Orlwoola, Limited, including the trade marks, was purchased by the Leigh Mills Company, Limited, in whose name the trade marks now stood. In 1898 J. N. Brock & Co. had applied to register the word "Osowoolo" as a trade mark in class 38. The application was opposed by the Leigh Mills Company on the ground of the similarity of the word to "Orlwoola," and the applicants retaliated by moving to have the "Orlwoola" marks struck off the register. The application for registration was refused by the registrar, and his refusal was affirmed by Eve J., and there was no appeal against that decision.

The motion to rectify was based upon the ground that the word "Orlwoola" had none of the essentials necessary for a registrable trade mark, inasmuch as it was merely a misspelling of the words "all wool" with the addition of the letter "a," and that it was descriptive of the goods to which it was applied if they were composed wholly of wool, and, if they were not so composed, was deceptive.

The motion was opposed by the Leigh Mills Company, Limited, and s. 9, sub-s. 5, and s. 36 of the Trade Marks Act, 1905, were relied on as shewing that these trade marks could not be removed. Eve J., after referring to the sale of the business to the respondents in 1901, stated the effect of the evidence as follows:—"The respondents have ever since continued to use the trade mark for goods sold in this country, in the colonies, and abroad. The sales have been considerable, and a sum of 8000*l.* or thereabouts has been expended in advertising their goods in connection with the mark. On the evidence I have come to the conclusion that the word has become identified with the goods of the

respondents, that is to say, that persons to whom the name was known recognized it as identifying goods of a common origin. There is no evidence that the registration of the mark has caused any deception, or given rise to any confusion, or inflicted any hardship upon other traders."

The learned judge then referred to ss. 9 and 36 of the Trade Marks Act, 1905, and said that in order to succeed in removing the respondents' marks the applicants must satisfy the Court not only that they were not registrable under the Acts in force in 1889 and 1900, but, further, that they were not registrable under the Act of 1905. It was contended that the registration was calculated to create the impression that the owners of these marks had a monopoly of the descriptive phrase "all wool" and to expose honest competitors to the risk of committing innocent and inadvertent infringements. In his Lordship's opinion the first of those objections was obviated by the disclaimer which accompanied the registration and by the provisions of s. 44, and with regard to the second objection the respondents were justified in pointing to the practical experience of the past as the truest indication of what was likely to obtain in future. Upon the whole facts he came to the conclusion that there were no circumstances which would justify him in deciding that the respondents were not entitled to retain the advantages which actual user of the marks for many years had given them, and he thought that the marks were registrable under the Act of 1905, and accordingly that they could not be expunged from the register, although not registrable under the statutes in force when they were in fact registered. He therefore refused the motion with costs.

The applicants appealed.

Jessel, K.C., and *Moulton*, for the appellants. The word "Orlwoola" can never be distinctive; it is simply descriptive of the article to which it is applied. It is calculated to deceive, and its registration is forbidden by s. 11 of the Act of 1905. It would lead the public to suppose that the respondents were the only people entitled to sell all wool goods. We are persons aggrieved within s. 35, and we ask the Court to expunge the mark from the register. It would not have been capable of registration under

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the Acts of 1883 and 1888, for it is a descriptive word and not an invented word. The only question is whether it is registrable under the present Act so as to be irremovable by virtue of s. 36.

[They were stopped by the Court.]

P. O. Lawrence, K.C., and *Sebastian*, for the Leigh Mills Company. There can be no confusion caused by the resemblance of "Orlwoola" to "all wool." That is provided for by our disclaimer of any exclusive rights in "all wool." The question depends on the appearance of the mark, not on the sound of the word when it is pronounced. We accept the position that "Orlwoola" could not have been registered under the old Acts, but we contend that it is a distinctive word within s. 9, sub-s. 5, of the Act of 1905; that it is therefore capable of registration under that Act; and that, inasmuch as it is actually on the register, s. 36 provides that it cannot now be expunged therefrom. To determine whether it is registrable the Court may have regard to user. The form of the word is unimportant. There are numbers of words on the register which are only misspelt, as for instance "Uneeda." This mark may not be registrable under s. 9, sub-s. 4, but may yet be "adapted to distinguish" within sub-s. 5. The evidence shews that it does in fact distinguish our goods, and no confusion has been proved, although the mark has been on the register for ten years. The only monopoly we get by registration is of the misspelling. That the registrar considers it a good mark is shewn by his refusal to register "Osowoolo." That was affirmed by Eve J., and there is no appeal from his decision. A meaningless suffix will not make a word an invented word, but it may be very important on the question whether it is distinctive. The truest indication that no confusion is likely to occur in the future is the fact that there has been none hitherto, and that no one else has attempted to use a similar mark. That is a reason why the Court should support the registration: *In re Registered Trade Marks of Bass, Ratcliff & Gretton, Ld.* (1)

Sargant, for the registrar, left the matter to the Court.

Cur. adv. vult.

(1) (1902) 19 Rep. Pat. Cas. 529, 539.

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Nov. 18. COZENS-HARDY M.R. These three appeals render it necessary to consider for the first time in this Court the meaning and effect of s. 9 of the Trade Marks Act, 1905, and the extent to which the earlier statutory enactments have been altered by that section.

A trade mark which is capable of registration under the Act of 1905 must contain or consist of at least one of five essential particulars mentioned in s. 9. Nothing turns upon either (1.), (2.), or (3.), but (4.) is as follows: "A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname." This differs from the older enactment in two respects—(*a*) by inserting "direct" before the word "reference," thus, perhaps, allowing some words which have only an indirect reference to character or quality to be registered; (*b*) by inserting before the words "a geographical name" "according to its ordinary signification." Then comes the fifth sub-section, which, with the relevant proviso, is as follows: [His Lordship read it.] Wealthy traders are habitually eager to enclose part of the great common of the English language and to exclude the general public of the present day and of the future from access to the inclosure. Some protection against these attempts is furnished by sub-s. 5, which requires a preliminary order of the Board of Trade or the Court. The duty of the tribunal is not to declare that the mark ought to be registered, but only to give liberty to proceed with the application. Such liberty ought to be given when there is a sufficient prima facie case made out. And whenever there has been long-continued and extensive user as a trade mark, that circumstance should, in ordinary cases, suffice to establish a right to proceed. But mere user is not necessarily decisive. The words in the proviso are "may take into consideration," and these words must not be treated as equivalent to a positive command to grant the application. A wide discretion is vested in the tribunal.

Now it is apparent that no word can be registered under this sub-section unless it is "distinctive," that is to say, is "adapted" to distinguish the goods of the proprietor from the goods of other persons. There are some words which are incapable of being so

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"adapted," such as "good," "best," "superfine." They cannot have a secondary meaning as indicating only the goods of the applicant. There are other words which are capable of being so "adapted," and as to such words the tribunal may be guided by evidence as to the extent to which use has rendered the word distinctive. It is easy to apply this sub-section to geographical words, and it is possible to suggest words having direct reference to character or quality which might be brought within it. But an ordinary laudatory epithet ought to be open to all the world and is not, in my opinion, capable of being registered. It may be that within a particular area the applicant might succeed in a passing-off action against a trader who used the epithet without sufficiently distinguishing his goods from the goods of the applicant. But that would not justify the Court in giving the applicant a monopoly throughout the United Kingdom in the use of a laudatory epithet. Whether in any particular case the word is or is not something more than a laudatory epithet is for the tribunal to decide. If it is open to doubt, the tribunal may direct the application to proceed. If, however, the tribunal is satisfied that the word is purely laudatory, the application ought not to be allowed to proceed, and if the application has been allowed to proceed, it ought to be refused at the second stage.

It is not unimportant to observe that a laudatory epithet, if allowed to be registered, cannot be removed after seven years. It may be applied to any goods of the proprietor, although the character of such goods may in course of time have changed for the worse; and the sanction of a Government department ought not to be given to that which might thus be calculated to deceive: see s. 11.

There is one important distinction between word marks and other marks. The former appeal to the ear as well as, and indeed more than, to the eye. The latter appeal to the eye only. It seems to follow that a word, not being an invented word, ought not to be put on the register if the spelling is phonetic and resembles in sound a word which in its proper spelling could not be put on the register.

It remains to consider separately the three appeals before us.

In the first case it is sought to register the word "Perfection"

as a trade mark for common or household soap. It is proved that Messrs. Crosfield have a very large business in Lancashire and Yorkshire and the Midlands, and that they have largely advertised their Perfection soap. Of the millions of cakes sold every one has had "Crosfield's Perfection Soap" upon it, together with their trade mark, two pyramids. The comptroller and the learned judge declined to allow the applicants to register "Perfection," and I agree with them. It was admitted by counsel that "perfect" could not be registered, and that admission is fatal to the case of the appellants. "Perfection" is used adjectively and is a mere laudatory epithet. It is thus used in the soap trade and in many other trades, and I think it would be wrong to allow a monopoly in the use of such a word, which, moreover, may in course of time become false and misleading. If the appellants were seeking to register "Crosfield's Perfection" different considerations might arise. In my opinion the appeal must be dismissed.

In the second case Warrington J. has declined to allow the appellants to proceed with an application to register "California Syrup of Figs" on the ground that it is a mere geographical name applied to a well-known article. Now this has been for many years a widely-known proprietary medicine. The name has been recognized in litigation as a trade mark. In these circumstances I think it would be wrong to preclude the applicants from endeavouring to obtain registration. It is not for us to say at this stage that the mark is distinctive and ought to be registered. That is a matter for the next stage, when opponents can be heard and when every objection, including s. 11, may be raised. I think this appeal must be allowed.

In the third case "Orlwoola" was registered under the old law as applied to woollen goods. An application was made to remove it from the register. It was not contended before us that it was properly registered, but it was argued, and the learned judge has held, that under s. 36 it cannot be removed, because it is a mark which under the Act of 1905 is registrable. I cannot accede to this argument. It is plain that "all wool" could not be registered, and indeed these words are disclaimed on the face of the register. This word is a mark which appeals to the ear far more

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than to the eye, and for the reasons which I stated in my general observations I think it is obviously not distinctive. There are further difficulties in the way, because the mark is applied to other than woollen goods, but I prefer to base my judgment on general grounds. I think this appeal must be allowed.

FLETCHER MOULTON L.J. In the cases now before us the Court of Appeal is, for the first time, asked to interpret and apply the provisions of the Trade Marks Act, 1905, relating to the registrability of words as trade marks. These provisions make a change in trade mark legislation which may in some respects be regarded as a new departure. Under previous Acts registrability, if granted at all, was confined to certain classes of words, and no word outside those specified classes could obtain registration as a trade mark. The questions which, under those Acts, came before the Courts for decision were purely legal questions as to whether the particular words came within the classes thus privileged. But under the present Act (though it retains these privileged classes in a somewhat extended form) the fact that a word is not within any of these privileged classes is not decisive as to its registrability. If the permission of the Board of Trade, or the Court, can be obtained, words become capable of registration as trade marks which do not belong to these classes. In the cases before us that permission has, in effect, been asked and refused, and it is from those refusals that these appeals are brought.

The new provisions are to be found in sub-s. 5 of s. 9 of the Trade Marks Act, 1905. To my mind they are chiefly directed to remedy two well-known defects in the working of the previous legislation. In the first place, the exclusion of words under that legislation was by whole classes. But, though it may be desirable in general to exclude from registration words of a particular class, it by no means follows that every individual word in that class would be objectionable as a trade mark in the case of every kind of goods. For example, few would doubt the desirability of excluding geographical terms as a class. But if, as suggested during the argument, a trader desired to register Monte Rosa for cigarettes, or Teneriffe for boiler plates, no practical inconvenience could arise from his doing so. The second defect was more

difficult to remedy, but, on the other hand, it affected cases that had strong claims on their merits. It often occurs in trade that by continued use words get recognized as denoting the goods of a particular firm. These words may in themselves be unsuitable to be chosen as trade marks, but they have in fact become so. The oft-quoted case of "Yorkshire Relish" is one example of this, and the words "Worcester Sauce" would almost certainly have been another example had the original makers of the article exercised due vigilance in protecting their rights. Apart from the Trade Marks Acts there would be nothing to prevent such words becoming trade marks in the eye of the law, and it was an obvious defect in the earlier legislation that it failed to give the benefits of registration to such marks when they had become duly established. The present Act seeks to remedy these defects by abandoning the policy of absolute exclusion of all the members of specified classes of words and substituting therefor a judicial examination of the merits of each individual case, and leaving the Court free to pronounce the word or words to be eligible for registration if on such an examination it holds it proper to do so.

Sub-s. 5 of s. 9 of the Act authorizes the registration of "any other distinctive mark" (that is, a mark not included in the preceding classes), "but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.), and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark."

Much of the argument before us on the part of the opponents and the Board of Trade was based on an assumption that there is a natural and innate antagonism between distinctive and descriptive as applied to words, and that if you can shew that a word is descriptive you have proved that it cannot be distinctive. To my mind this is a fallacy. Descriptive names may be distinctive and vice versa. No words are, as a class, more directly and intentionally distinctive than proper names, and yet originally they were usually, if not invariably, descriptive in all languages. They still are so among savage peoples, and although among civilized nations the original significations of proper names are not remembered, or regarded, we see that the natural tendency to use descriptive words as names still exists, since nick-names—

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the only names that are now invented—are usually descriptive. There is therefore no natural or necessary incompatibility between distinctiveness and descriptiveness in the case of words used as trade marks. The notion that there is such an incompatibility is confined to lawyers, and is, in my opinion, due to the influence of the earlier Trade Marks Acts. By these Acts, which are now repealed, the fact that words were descriptive of the goods was fatal to their registration as trade marks, and thereby being treated by the law as distinctive of the goods of a particular maker. But the question whether a word is or is not capable of becoming distinctive of the goods of a particular maker is a question of fact, and is not determined by its being or not being descriptive. The law has never refused to recognize that this is the case, or to give protection to descriptive trade marks when once duly established in fact, although (except in the case of old marks) they refused registration and left the owners to obtain protection in another form of action. This is now changed, and under the provisions of the present Act the Court clearly has power to allow descriptive words to be registered if a case on the merits is proved before it sufficiently strong to induce it to do so. The language of s. 9, sub-s. 5, puts this beyond doubt; but if any doubt upon the point could remain it would be set at rest by the language of s. 44, which provides that "No registration under this Act shall interfere with . . . . the use by any person of any bona fide description of the character or quality of his goods," clearly indicating that a registered trade mark may have as its essential part words capable of being used descriptively.

Having thus established the jurisdiction of the Court to permit the registration of words having a direct reference to the character and quality of the goods (as well as geographical terms), it remains to consider the principles on which this jurisdiction should be exercised. Nothing that I have said must be taken to imply that I consider the effect of sub-s. 5 to be to leave the matter at large so that it is indifferent for the purposes of registration whether a word is or is not within the classes specified in (3.) and (4.). On the contrary, I am of opinion that the fact that the Legislature has required in these cases a preliminary

permission to proceed evidences that it intends the excepted cases to be carefully considered on their merits before they are pronounced to be eligible to obtain the privileges of registration. The tribunal before whom is brought an application to register a word under sub-s. 5 is entitled to regard the word as prima facie unsuitable by reason of its being outside the specified classes, and it is for the applicant to shew that it is proper to be registered. This he may do by arguments based on the word itself and the nature of the goods with respect to which it is sought to be registered, as I have already indicated in the case of geographical terms. The exact issue is formulated in the sub-section, and if the tribunal is of opinion that the nature of the word is such that it is adapted to distinguish those particular goods of the trader from those of other persons, it will be its duty—in the absence of special circumstances—to allow the registration to proceed. But the applicant is not confined to arguments drawn from the word itself. He may support his application (in the case of a mark already in use) by shewing that by user the mark has in fact become more or less completely identified with the goods by having been continuously used in connection therewith, and the statute expressly provides that the Court may take this into consideration for the purposes of its decision. To my mind this provision can bear but one interpretation. It recognizes that distinctiveness, i.e., being adapted to distinguish the goods from those of other traders, is not necessarily an innate quality of the word. It may be acquired. There may be cases in which, if the Court says, "The word is descriptive of the goods, and cannot be distinctive solely of your make of those goods," the applicant may (if he can) reply thereto, "I will shew that it can become distinctive of my make of those goods by shewing that it has actually become so either generally or in a particular market." To use a phrase suggested by Farwell L.J. during the argument, the reply is of the type of "solvitur ambulando": "It can denote my goods because it actually does so." The extent to which the Court will require the proof of this acquired distinctiveness to go will depend on the nature of the case. If the objections to the word itself are not very strong, it will act on

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less proof of acquired distinctiveness than it would require in the case of a word which in itself is open to grave objection. I do not think, for instance, that any amount of evidence of user would induce a Court to permit the registration of ordinary laudatory epithets such as "best," perfect," &c. On the other hand, in the case of a peculiar collocation of words it might be satisfied with reasonable proof of acquired distinctiveness, even though the words taken separately might be descriptive words in common use. In this connection the provisions of s. 44 afford, in my opinion, useful guidance. The registration is not to affect the use of the words by other traders in any bona fide description of the goods. The Court will therefore do well to ask itself the question, Will the registration of the trade mark cause substantial difficulty or confusion in view of these rights of user by other traders? If the answer is in the affirmative, the Court will probably hesitate to allow the word to be registered. But if the answer be in the negative, either by reason of the nature of the words, or because past user has limited the possibility of other traders safely or honestly using the words, the Court may well grant the desired permission.

In conclusion I desire to say that I have no doubt that the permission required by sub-s. 5 is of the nature of a permission to proceed with the application for registration. Its sole effect is to enable the word or words to act as the essential particular of a trade mark. Whether the trade mark will ultimately be registered will depend on the facts brought to light by the opposition and the searches that may be made during the application. The decision of the Court in granting the permission in no way prejudices the rights of opposing parties. It only prevents it being alleged that the registration would be ultra vires because the word or words do not belong to any of the classes specified in sub-ss. 3 and 4. It now remains to apply these conclusions of law to the special facts of the three cases before us.

Perfection.

This is an application to register "Perfection" or "Perfection Soap" as a trade mark for household soap. The evidence, which is very voluminous, establishes the following facts. It has for

many years past been the custom for large manufacturers of household soap in this country to put their soap on the market under special names or brands. Thus Messrs. Lever Brothers sell the largest part of their output under the name of "Sunlight Soap," Messrs. Watson of "Matchless Cleanser," and Messrs. Crosfield, the applicants, of "Perfection." These names or brands are well known to the makers of soap, and many of them are so widely known to the public that it may well be that no maker could honestly put out soap for sale in the general market under one of these well-known names. But that by itself is not sufficient to establish the case of the applicant. The name he has selected is the ordinary laudatory term "Perfection." Speaking only for myself, I am not much impressed by the argument that such a word ought not to be allowed to become a trade mark because a more perfect method of making soap might be invented, and that in such case the use of the trade mark would tend to deceive the public. The use of inordinate laudation of his goods by a trader is too deeply rooted and too ineradicable not to be well known to all the public, and I do not believe that any person buying soap would suppose that it was perfection merely because the maker calls it so. But to my mind this tells against the applicants. It shews that the word is one that probably, and I might almost say naturally, would be used by others in the description of their soap. To me there is not much difference in this respect between the noun "perfection" and the adjective "perfect." Therefore I think we ought not to allow it to become a trade mark. I regret to have so to decide, because I feel that there has grown up a vast trade round the word which cannot be protected by the agency of the Trade Marks Act, but must be defended so far as it can by other and less efficient methods. But it is the consequence of the applicants having been so unwise as to choose a mere laudatory word for their brand. Had the word been less objectionable in its nature the case that has been proved before us would have influenced me greatly, for it shews to my mind that throughout about half of England the past user of the word has identified it in the eyes of the public with the goods of the applicants.

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These words collectively form the commercial name of a well-known aperient medicine. The evidence is ample to establish a prima facie case of these words being identified by long user with the goods of the applicant. There is no inherent difficulty in accepting such a conclusion in the case of a compound appellation such as this, nor is there, in my opinion, any likelihood of other traders being placed in difficulties by having to avoid it. They can easily find adequate descriptions of any goods they may wish to sell without adopting this compound name, even if they could honestly make use of it at all. I am therefore of opinion that the evidence before us justifies us in allowing the registration to proceed.

Orlwoola.

This case presents no difficulty. It is in substance a case of registration of the words "all wool" grotesquely misspelt as a trade mark for textile fabrics. When a trade mark consists solely of words it will be used orally as well as in writing, and to be proper to constitute a trade mark such words must be suitable, whether spoken or written. The misspelling does not affect the words when spoken, so that we have only to decide whether the words "all wool" are proper for registration in respect of such goods. To this there can be but one answer. If the goods are wholly made of wool, the words are the natural and almost necessary description of them. If they are not wholly made of wool, it is a misdescription which is so certain to deceive that its use can hardly be otherwise than fraudulent. In either case the words are utterly unfit for registration as a trade mark.

FARWELL L.J. The object of trade mark law, whether before or after the Trade Marks Acts, is to protect honest trading: to restrain a man from passing off another's goods as his own was an old head of equity; but in exercising that jurisdiction, as in construing the Trade Marks Acts, the Court is careful not to interfere with other persons' rights further than is necessary for the protection of the claimant, and not to allow any claimant to

obtain a monopoly further than is consistent with reason and fair dealing. Again it is necessary to bear in mind that in passing-off actions the Court determines questions simply inter partes, but trade marks give rights against all the inhabitants of the United Kingdom: it is necessary, therefore, to be careful in construing these Acts so to read them as not to hamper fair trade. There is no conflict between Parliament and the Courts, as some of the counsel suggested: the foundation of the whole matter was in the Court of Chancery: it is merely that the principle of protection of fair trade has been simplified and developed by legislation so as to enable a trader who has established that a mark, device, or the like really denotes his goods, and his goods only, to register his title and so avoid the necessity of proving it against every defendant, very much as a patentee who has established by litigation the validity of his patent gets from the Court a certificate of validity. The Acts also provide for the registration of new marks which the trader proposes to identify with his goods. The area of indicia available as trade marks has been increased by the successive Trade Marks Acts: under the Act of 1875 no mere word was registrable at all: the Act of 1883 extended the area of registrability by admitting fancy words not in common use, and the Act of 1888 again extended it by admitting words having no reference to the quality and character of the goods and not being a geographical name. This has received a further development in the Act of 1905, by s. 9, sub-s. 5, of which these excluded words may, if distinctive, be registered by order of the Board of Trade or the Court. But the whole basis of the enactment is that the word or words to be registered must be distinctive, i.e., adapted to distinguish the goods of the proprietor of the trade mark from those of other persons; and this is obviously right and just, for a trade mark is necessarily a monopoly, and although it is no doubt proper and not injurious to any honest man to allow a trader to monopolize a trade mark in certain cases, it would be wrong to allow to any one man a monopoly of ordinary words, commonly used in the trade and simply descriptive of the nature or colour or laudatory of the quality of the goods; e.g., cotton—blue—good. The question is not merely one between the applicants and the

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opponents who appear before the tribunal: no agreement between them ought to influence such a tribunal: as Bowen L.J. said in *In re Paine & Co.'s Trade Marks* (1), "The purity of the register of trade marks . . . . is of much importance to trade in general, quite apart from the merits or demerits of particular litigants," and it is the duty of the tribunal to see that no word not "adapted to distinguish" shall be put on the register in the interest of other traders, wholesale and retail, and of the public. If this were not so, the large and wealthy firms, with whom the smaller folk are unwilling to litigate, could by a system of log-rolling (such as is suggested by Crosfield & Co.'s letters in the present case) divide amongst themselves all the ordinary words of description and laudation in the English language. The object of the proviso at the end of s. 9 appears to me clear: there were many cases under the former Acts in which a plaintiff in a passing-off action proved that certain words denoted his goods, and his only, either universally or in some localities, but they were not registrable because they were descriptive or geographical—for example, Yorkshire Relish—and accordingly it was provided that the test of experience might be applied if the tribunal thought fit. But the jurisdiction is discretionary, and there are cases in which it is obvious that the words proposed are not "adapted" and that no amount of evidence could shew they had lost their primary meaning; and in such cases the tribunal may well refuse to admit evidence. The issue is not the same as in a passing-off action: as against a fraudulent defendant knowingly attempting to steal the plaintiff's credit, words accurately describing the substance of the article may be deemed to have acquired a secondary meaning—for example, camel hair—but as a trade mark effective against the whole of the United Kingdom it would be impossible, in my opinion, to establish any such case: see *Cellular Clothing Co.* v. *Maxton & Murray*. (2) I cannot myself see how words which are simply a direct statement of quality—for example, "good" or "best"—can ever lose their primary meaning and come to mean not good or best, but the articles made by A. B.

(1) [1893] 2 Ch. 567, 584. (2) [1899] A. C. 326.

Coming to the particular case before the Court, I am of opinion that "Perfection" is not registrable as adapted to distinguish Crosfield's soap; it is admitted that it is used adjectivally in the soap trade and in many other trades, and that it would be hopeless to apply to register "perfect," but it is said that the evidence shews that user has rendered the word distinctive to such an extent as to make it proper for registration. My own opinion is that no amount of user could possibly withdraw the word "perfection" from its primary and proper meaning in the soap trade and make it mean "Crosfield's" instead of perfect; but the learned judge's findings of fact (with which I do not propose to interfere) are, in my opinion, fatal to the applicants. Registration of this word would give the applicants a monopoly of it as applied to common soap in the whole United Kingdom, although the soap is entirely unknown in the south or south-west of England and very little known in London. It may well be that universal knowledge throughout the United Kingdom need not be required by the tribunal under the proviso, but the "extent" referred to in the section must be something very different from that proved in this case, and I think the judge has taken a view more favourable to the applicants than I should myself have done. Further, I think the word is "calculated to deceive" within s. 11. These words do not, of course, require any fraudulent intent; it is sufficient if the tribunal thinks them calculated to deceive. A trade mark passed by a Government department like the Board of Trade, which describes the applicants' soap as "Perfection," may well mislead thousands of poor people who buy this soap into the belief that the Government department has inquired into the merits of this soap and is satisfied that it is "perfection." Moreover, the mark remains for all time and is conclusive after seven years under s. 39 and is assignable at any time. Even if the applicants' soap had been proved (as it certainly has not) to be perfection, it would be impossible to predicate that it will remain so for all time and in the hands of all assignees thereof. I see no hardship on the applicants in refusing their claim: they have chosen to take a mere laudatory word, although they have not in the past relied on it alone, doubtless because they well knew down to 1905 that it was idle to call it a trade mark. I

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regard the application as a bold attempt by a wealthy firm to deprive their competitors, great and small, of the use of a laudatory term common to all, and I am of opinion that it ought to fail and be dismissed with costs.

California Syrup of Figs.

This case comes before us on the preliminary inquiry. The words are excluded by sub-s. 5 unless an order is obtained that they are fit candidates to be considered distinctive so as to enable an application to the registrar to register under s. 12. It is sufficient for me to say that in my opinion the evidence given by the applicants shews user of such nature and extent as to authorize the Court, on applying the test of experience, to say that these words ought to be deemed fit subjects for consideration on an application under s. 12. The right claimed is to the four words as heretofore used: such a mark would give no exclusive right to "California," and although I agree with Mr. Sargant that the tribunal has to consider the future as well as the present on these applications, I see no reason to apprehend that the use of those four words to denote only the particular laxative drug manufactured by the applicants will unduly interfere with any honest trade mark of any other person. I agree with Warrington J.'s opinion (1) that the Legislature has not said that if it has in fact become distinctive, then it is in all cases to be regarded as adapted to distinguish. It is a question for the judge in each case having regard to the extent of user, but I do not follow his conclusion that he would be giving a monopoly in "California": the only monopoly is in the four words actually used, and nothing that would not be a colourable imitation of that mark in a passing-off action would be such in an action on the trade mark.

In my opinion this application to register should be allowed to proceed.

Orlwoola.

Although this application is different in form from the others, it is the same in substance, namely, is "Orlwoola" registrable under s. 9? I am of opinion that it is not. "All

(1) [1909] 2 Ch. 99, 109.

wool" or "all woolly" cannot possibly be regarded as adapted to distinguish woollen goods: they are purely descriptive of their nature. I doubt if any amount of evidence could prove that they had lost their primary and acquired a secondary meaning. It can make no difference whether the words are spelt phonetically, fantastically, or conventionally: they are registered in respect of all wool goods, and to the ear they mean all wool. It is said that to the eye "Orlwoola" and "all wool" are quite distinct; but that is not enough: the mark is not pictorial, but verbal, and words are meant to be spoken as well as read, and the pronunciation of words by the British public is at the present day somewhat various. Further, I am of opinion that the evidence of user as found by the learned judge is insufficient. He says that "persons to whom the name was known recognized it as identifying goods of a common origin"; but this is not enough: there may be a few thousand people only in the United Kingdom who ever heard of the name of the makers, but their knowledge falls far short of the generality required to establish a monopoly for the United Kingdom, and I observe that the evidence that any of the public knew "Orlwoola" at all is of the slightest description.

Again, the registration is for articles made not only of wool, but of worsted and hair; the word "Orlwoola" as spoken is calculated to deceive under s. 11. This is another reason for removing the mark.

I agree that the appeal must be allowed.

In the second appeal (the California Fig Syrup Co.'s case), *Astbury, K.C.* (with him *Sebastian*), for the appellants, applied that the costs of the registrar should not be allowed either in the Court of Appeal or in the Court below. He referred to s. 48 of the Trade Marks Act, 1905, and to *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks.* (1)

Sargant, for the registrar. The registrar ought to be allowed his costs here and below. This is a case of great public

(1) [1898] A. C. 571, 585.

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importance, and there has been a difference of judicial opinion upon it. The presence of the registrar was required in order that the case might be properly argued; it could not have been satisfactorily dealt with ex parte. These costs are really part of the costs of registration.

COZENS-HARDY M.R. In this case, in the exercise of our discretion we think there is no ground for interfering with the order of the learned judge in the Court below that the applicants should pay the costs of the registrar, but in this Court we think that there ought to be no costs. But this must not be taken to be the rule in all cases

Solicitors in the first appeal: *C. Urquhart Fisher & Co., for Alexander Wilson & Cowie, Liverpool; Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool; Solicitor to the Board of Trade.*

Solicitors in the second appeal: *McKenna & Co.; Solicitor to the Board of Trade.*

Solicitors in the third appeal: *S. E. Lambert; Timbrell & Deighton; Solicitor to the Board of Trade.*

H. B. H.

In re JAMES.
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[1909 J. 869.]

JOYCE J.
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Nov. 3, 4.

Married Woman—Settlement—General Power to Appoint by Will—Event in which Power to arise—Non-occurrence—Exercise of Power during Coverture —Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 3—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.

Under a marriage settlement property was settled upon trust for the wife and her husband for life, and if there should be no children and the husband should die in the lifetime of the wife (both of which events happened), then after his death in trust for her absolutely. Then followed a trust, in the event of the husband surviving the wife, giving her (subject to his life interest) a general power of appointment by will notwithstanding coverture, and subject thereto the trust funds were to go to her next of kin. The husband died in 1905 and the wife in 1908. By her will, dated in 1895, the wife, in exercise of the power and of all other powers (if any) thereunto enabling her, appointed that the trustees should after the death of her husband stand possessed of the property subject to the settlement for certain named persons, and, after making specific bequests, she gave her residue to her husband absolutely :—

Held, that the effect of s. 3 of the Married Women's Property Act, 1893, was to make the will operate upon all that the testatrix had at her death ; that at her death, in the events which happened, the settled property was held upon trust for her and passed to the appointees as a specific disposition under her will.

By an indenture of settlement dated April 15, 1861, being a settlement made upon the marriage of Mr. and Mrs. James, certain property then belonging to the wife was settled upon trust for sale, conversion, and investment and to pay the income thereof during the joint lives of the husband and wife to the wife, and from and after the death of the husband if he should first die (which event happened) to pay the income to the wife during her life, and after her death upon trust that the trustees should stand possessed of the trust funds and the annual income thereof in trust for the issue of the marriage as the husband and wife or the survivor should appoint, and it was thereby agreed that if there should be no such child of the said intended marriage who should being a son attain the age of twenty-one years or being a daughter attain that age or marry

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under that age, then subject and without prejudice to the trusts and powers thereinbefore contained the trustees should stand and be possessed of the trust funds upon the trusts following, that is to say, if the husband should die in the lifetime of the wife, then from and after his death and such default or failure of claim as aforesaid which should last happen in trust for the wife, her executors, administrators, and assigns, but if the wife should die in the lifetime of the husband, then from and after the death of the wife and such default or failure of issue as aforesaid which should last happen in trust for such person or persons and for such purposes as the wife should notwithstanding coverture by will or codicil appoint, and in default of such appointment and so far as no such appointment should extend in trust for the wife's next of kin according to the statute as if she had died intestate and without having been married.

There was no issue of the marriage.

By her will, dated September 12, 1895, Mrs. James, after reciting that under the settlement she had a general power of appointing the trust funds by will, directed as follows: "Now in exercise of the power for this purpose so given to me as aforesaid and of all other powers (if any) hereunto enabling me I hereby appoint that the trustees or trustee for the time being of my said marriage settlement shall after the decease of my said husband stand possessed of all the monies stocks funds and securities for the time being subject to the trusts thereof upon trust as to one equal half part thereof for my niece Alice Maria Henrietta Bethune and my nephew Norman Henry Bethune or for such one of them (if only one) as shall then be living and if more than one in equal shares, and as to the remaining equal half part thereof for my nieces Jane Hole and Felicia Sophia Hole or for such one of them (if only one) as shall then be living and if more than one in equal shares"; and the testatrix, after making certain specific bequests, gave and bequeathed all the residue of her personal estate unto her said husband absolutely.

Mrs. James died on November 12, 1908, her husband having predeceased her on April 22, 1905.

In 1905 Mrs. James became through mental infirmity arising

from age incapable of managing her affairs, and on June 8, 1905, an order was made appointing a quasi-committee of her estate and authorizing the trustees of the settlement to lodge in Court the stocks and funds standing in their names as such trustees.

In pursuance of that order and of a further order made in the same matter on February 22, 1906, the trustees lodged the trust funds comprised in the settlement in Court.

This was an originating summons raising the question whether the property subject to the trusts of the settlement was effectually disposed of by Mrs. James's will, or whether she died intestate with respect thereto.

Guy Bowman, for the trustees.

Younger, K.C., and *Cann*, for the appointees. This case, coupled with the provisions of s. 3 of the Married Women's Property Act, 1893, is covered by the decision in *Jones* v. *Southall*. (1) That section was intended to counteract the effect of the decision in *In re Price* (2), and by virtue of that section this will is to be construed as if the testatrix had republished it after her husband's death. The will now operates on whatever she had at the time of her death, notwithstanding that she did not have it at the time of making her will.

The subsequent acquisition of the absolute beneficial interest will feed the disposition made by the will: *Cross* v. *Hudson*. (3)

In *Bishop* v. *Wall* (4) it was held that a will of a married woman made during coverture and not republished was a good disposition of the funds to which during the coverture she was entitled in reversion for her separate use contingently upon her surviving her husband. Sect. 3 applies to any will of a married woman who dies after the coming into operation of the Act: *In re Wylie*. (5) There has been no ademption: *Clough* v. *Clough* (6); *In re Wood*. (7) We submit that on the authorities cited the intention of this testatrix can be validly given effect to, and that the appointees ought to take the fund.

(1) (1861) 30 Beav. 187; before the Probate Court, (1859) 28 L. J. (P. & M.) 112.
(2) (1885) 28 Ch. D. 709.
(3) (1789) 3 Bro. C. C. 31.
(4) (1876) 3 Ch. D. 194.
(5) [1895] 2 Ch. 116.
(6) (1834) 3 My. & K. 296.
(7) [1894] 2 Ch. 577.

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Hughes, K.C., and *Bischoff*, for the trustee in bankruptcy of one of the next of kin. The will of the wife does not operate on the property if the will is made during the coverture and she turns out to be the survivor: *Trimmell* v. *Fell* (1); *Price* v. *Parker*. (2) The will could only operate as an execution of the power in the event of the lady dying before her husband.

The Married Women's Property Act, 1893, s. 3, does not make this a good exercise of the power, although it may operate to pass the property as residue. The result is the same, because the residuary legatee predeceased the testatrix.

There is nothing in s. 3 to operate so as to render that an appointment which is not already an appointment. There is no appointment here, because the event on which it was to arise, namely, that of the husband surviving the wife, did not happen. Whatever property the lady had at her death will no doubt pass under her will, unless there is a contrary intention expressed in the will. If on the construction of the will there is a contrary intention and these funds were not part of the lady's residue, then they are undisposed of. The result is the same either way.

Jones v. *Southall* (3) really supports our contention. There the lady was not married, and under the settlement the trust until marriage was for her absolutely. Her will was an appointment in terms, but she added the words "and I give," &c. She purported to exercise the power, which, however, never arose. It was held that the will took effect on the property included in the settlement. The will was dated after the Wills Act, and the lady being a feme sole, s. 24 applied. In all the text-books *Jones* v. *Southall* (3) is treated as having been decided on the ground that the lady was not a married woman.

Bishop v. *Wall* (4) was a case of separate estate and was treated as depending on that ground. It is not a question here whether the will is good, but whether the exercise of the power applies in the events which have happened. It is not disputed that if the power is validly exercised the Act of 1893 makes the will good with reference to property afterwards acquired without any republication. As to ademption, the lady appoints the funds

(1) (1853) 16 Beav. 537.
(2) (1848) 16 Sim. 198.
(3) 30 Beav. 187.
(4) 3 Ch. D. 194.

subject to the trusts of the settlement, and whether there be ademption or not, that disposition did not apply to the events which happened. She is contemplating that the funds are still settled, and does not deal with the case of her being absolutely entitled. The funds are not still subject to the trusts of the settlement: she is beneficially entitled and in a position to call for a transfer of them from the trustees. There has been no exercise of the power, because it has not arisen, and the Act of 1893 cannot operate to bring the funds within the appointment, but only to carry them as residue. There is no general gift to the appointees to take effect in the event of her surviving her husband. She does not use the words "give and bequeath" as in *Jones* v. *Southall.* (1)

It is admitted that the lunacy and what was done thereunder does not affect the case.

J. G. Wood, for the trustee in bankruptcy of another of the next of kin. The effect of s. 3 of the Act of 1893 is merely to adapt s. 24 of the Wills Act to the will of a married woman made during coverture. It does not say that the will is to be read forward to the death of the testatrix for all purposes, but only for the purpose of ascertaining the property which will pass. The will was only intended to operate in the event of the husband surviving. The testatrix only "appoints." In other parts of the will she uses the word "give."

Northcote, for the remaining next of kin.

JOYCE J. Having regard to the course of the argument and the proposition laid down by Mr. Hughes in discussing the matter before me—with which proposition, as I have already said, I entirely agree—I do not feel any doubt about the case. The effect of s. 3 of the Married Women's Property Act, 1893, in my opinion, was to make the will of a married woman executed during coverture operate upon all she had at her death. Then it was admitted—and could not have been seriously denied—that the lunacy in this case makes no difference, nor what was done under the lunacy; and that the case is to be dealt with as if this lady had not become a lunatic at all, but at the

(1) 30 Beav. 187.

JOYCE J. 1909 JAMES, *In re.* HOLE *v.* BETHUNE.

date of her death the securities which were the subject of the settlement had been in the hands of the trustees held upon trust for this lady, her heirs, executors, and administrators. In dealing with this case it seems to me that I must look at it as if all this fund had been in the hands of trustees at the time of the death of Mrs. James and had been held upon trust for her.

That being so, the case resolves itself into the question whether upon the construction of this will the property in question was disposed of at all; whether it formed part of the residue, or whether there was any specific disposition of it. No one but a lawyer in reading this will could entertain any doubt as to what was intended by the testatrix to be the effect of the disposition. I do not feel the slightest doubt about it. What has she said? She has said "In exercise of the power for this purpose so given to me"—that was the special power—"and of all other powers hereunto enabling me"—which would include the power which she had under this section of the Act of 1893—"I hereby appoint"—that is "I direct"—"that the trustees for the time being of the settlement shall after the decease of my husband stand possessed of all the securities subject to the trusts thereof upon trust" in a certain way. It is to my mind a plain direction to the trustees of the settlement—if she has power to direct them—to hold the securities upon trust after the death of the husband for the persons whom she named. That is the whole case, and that, in my opinion, is the true construction of this will, namely, that this is a specific disposition of all the funds as if they had been in the hands of the trustees at the time of her death held upon trust for her.

Solicitors: *Wood, Bigg & Nash, for G. D. Cann, Exeter; Tarry, Sherlock & King.*

G. A. S.

JOYCE J
1909
Nov. 9.

In re MIRRLEES' CHARITY. MITCHELL *v.* ATTORNEY-GENERAL.

[1903 M. 1174.]

Charity—Administration—Scheme—Construction — Application of Income—Charity out of Jurisdiction.

A scheme sanctioned by the Court for the administration of a charity provided that the income of the charity should be applied for the benefit of a particular hospital in England "or such other medical charity or charities of any kind, school, or teaching whatsoever, and partly or exclusively to one or other of such objects as the trustees may in their uncontrolled discretion from time to time determine." The trustees desired to apply the income to medical charities in Scotland:—

Held, that the charity must be administered and the trusts of the scheme carried into effect within the jurisdiction of the Court, and that the income could not be applied to a "medical charity or charities" in Scotland.

Adjourned Summons.

Elizabeth Mirrlees by her will, dated in 1901, gave to the plaintiff Mr. Andrew Mitchell, a Scotch advocate living in Edinburgh, the sum of 20,000*l.* apparently for his own use and benefit. In 1903 he commenced an action against the Attorney-General in which he admitted that he held the legacy upon trust for certain charitable purposes in accordance with the intentions of the testatrix, and he asked that a proper deed of trust or other instrument for carrying into effect the intentions of the testatrix might be sanctioned by the Court. On March 30, 1904, an order was made in the action sanctioning a scheme which was scheduled to the order. By that order Mr. Mitchell and two other persons, both of whom lived in England were appointed the first trustees of the charity.

Clause 14 of the scheme provided that subject to the payment of certain expenses of management the income of the charity should be applied "for the benefit of the Buchanan Hospital, Springfield Road, St. Leonards-on-Sea, or such other medical charity or charities of any kind, school, or teaching whatsoever, and partly or exclusively to one or other of such objects as the

JOYCE J. 1909

MIRRLEES' CHARITY, *In re.* MITCHELL *v.* ATTORNEY-GENERAL.

trustees might in their uncontrolled discretion from time to time determine."

Clause 18 provided that any question as to the construction of the scheme or as to the regularity or validity of any acts done or about to be done under the scheme should be determined by the Court.

This was a summons taken out by the trustees for the determination of the following among other questions, namely, whether upon the true construction of the scheme the expression "medical charity or charities" in clause 14 included a medical charity or medical charities situate or carrying on operations in Scotland.

The testatrix, who was by birth a Scotswoman, had at one time lived in Glasgow, but for many years she had resided in various places in England, amongst others St. Leonards-on-Sea, where she died in 1902, a domiciled Englishwoman. The greater part of the income of the charity had hitherto been applied towards the support of the Buchanan Hospital, but the trustees considered that, if competent under the scheme, they would be following the wishes of the testatrix if upon any redistribution or additional distribution they decided to apply the whole or part of the income towards similar charities in Scotland, the testatrix having been by birth and sentiment a Scotswoman.

Dighton Pollock, for the plaintiffs. There is an absolute discretion in the trustees under clause 14 of the scheme to apply the income to any medical charities in the United Kingdom.

[JOYCE J. You are asking for a declaration that under a scheme framed as this is the trustees may apply the income to a medical charity anywhere out of the jurisdiction.]

The application is confined to medical charities in Scotland. If this were an application for a scheme, I admit the Court would not sanction administration outside the jurisdiction. But the question here is as to the meaning of clause 14. Under that clause the only limitation is that the charities for the benefit of which the income may be applied must be medical charities. It is not desired that the administration of the charity

should be carried on outside the jurisdiction, but only that some portion of the income may be paid over to Scotch charities: *Forbes* v. *Forbes* (1); *Attorney-General* v. *Lepine* (2); *In re Duncan*. (3)

Sargant, for the Attorney-General. In the absence of any provision to the contrary the charity must be administered and the charities to be benefited must be charities within the jurisdiction of the Court which has sanctioned the scheme: *Attorney-General* v. *Campbell*. (4) The Court will not administer a charity in a foreign country, and for this purpose Scotland must be regarded as a foreign country. The commissioners could not hold an inquiry in Scotland as to whether the medical charities selected for benefit were proper objects. The absence of an expression of limitation cannot enlarge the jurisdiction.

There is no direct authority upon the point, but the following cases are not inapplicable: *Attorney-General* v. *Ironmongers' Company* (5); *Attorney-General* v. *City of London* (6); *In re Geck*. (7)

Upon the strict construction of this scheme no charity can be benefited except in England and Wales.

Dighton Pollock, in reply.

JOYCE J. This is a question of the construction of a clause in a charity scheme which was constituted under an order of the Chancery Division. The clause in question provides that "Subject as aforesaid the income of the charity shall be applied for the benefit of the Buchanan Hospital, Springfield Road, St. Leonards-on-Sea, or such other medical charity or charities of any kind, school, or teaching whatsoever, and partly or exclusively to one or other of such objects as the trustees may in their uncontrolled discretion from time to time determine in any one or more of the ways hereinafter mentioned." It does not say where the objects shall be, and there is no limitation at all in the scheme as to the locality of the medical charity to be ultimately benefited. I am told by learned and experienced

(1) (1854) 18 Beav. 552.
(2) (1818) 2 Swans. 181.
(3) (1867) L. R. 2 Ch. 356.
(4) (1872) L. R. 5 H. L. 524, 531.
(5) (1841) Cr. & Ph. 208.
(6) (1790) 1 Ves. Jun. 243.
(7) (1893) 69 L. T. 819.

JOYCE J. 1909 MIRRLEES' CHARITY, *In re.* MITCHELL *v.* ATTORNEY-GENERAL.

counsel that there is no authority that can be found on the exact point or very near the exact point in question, and I cannot say that I recollect any, but the general impression upon my mind is, and in the absence of authority I venture to decide, that a scheme of this kind in general terms, there being nothing with reference to any foreign country in it, means that the charity is to be administered and the trusts of the scheme carried into effect within the jurisdiction of the Chancery Division which constituted the scheme. That is the impression on my mind after some little experience, and I am told that there is no authority to the contrary.

I am therefore of opinion that the scheme as it stands—it would be very easy to get it altered if thought proper—is that the income of the charity is to be applied for the benefit of the Buchanan Hospital or such other medical charity or charities of any kind, school, or teaching whatsoever whose operation is within the jurisdiction. There will be a declaration that the expression "medical charity or charities" in clause 14 of the scheme is limited to medical charities within the jurisdiction.

Solicitors: *Blake, Heseltine, Child & Crailsheim; Solicitor to the Treasury.*

G. A. S.

In re JONES.
LEWIS *v.* LEWIS.

[1909 J. 968.]

JOYCE J.
1909
Oct. 26, 27; *Nov.* 11.

Will—Construction—Gift to A., B., C., and their Children—Gift over on Death of A., B., or C. leaving no Issue—Realty—Chattels Real—Gift in Succession—Executory Bequest or Limitation over on Death of Parent—Rule in Wild's Case.

By his will the testator gave his leasehold and real estate to his wife for her life and on and immediately after her death he gave "whatever may be left" after the discharge of all claims against his estate to his children, namely, as to two fifths to his son and as to the other three fifths to his two daughters in two equal shares, share and share alike, "and to the child or children of the three said children In case any of my children dying and leaving no legal issue, the share or shares of those dying to be given to the surviving child or children of such as will be dead My daughters' and granddaughters' shares to be independent and free from all husbands." His wife survived the testator. Only one of the grandchildren was born during her life. On a summons by the three children for the determination of their interests :—

Held, that no child of the testator was at present entitled to his or her share absolutely, but that such share was subject upon the death of the child to an executory bequest or limitation over to his or her children, and also subject to the gift over in case of any of the children dying and leaving no legal issue, the meaning of which would have to be decided when, if ever, the event happened.

The rule in *Wild's Case*, (1599) 6 Rep. 16 b, has no application where the gift or devise to the children would without reference to the rule be a gift in succession to, and not concurrently with, their parent.

Adjourned Summons.

By his will Mordecai Jones, the testator, disposed of his real and leasehold estate in manner following :—"2nd I give devise and bequeath all and every my leasehold and real estate of what kind or nature soever and wheresoever unto my beloved wife Margaret Jones for and during her natural life free and independent of all husbands she may intermarry 3rd On and immediately after her decease I give devise and bequeath whatever may be left (as soon as all claims against my estate are fully paid and liquidated) to my dear children in the following proportion namely two fifths of the whole of my estate to my

JOYCE J. 1909 JONES, *In re.* LEWIS *v.* LEWIS.

son Mordecai John Morgan Jones and the other three fifths to my daughters Mary Margaret and Ellen Elizabeth in two equal shares share and share alike and to the child or children of the three said children In case any of my children dying and leaving no legal issue the share or shares of those dying to be given to the surviving child or children of such as wil. be dead My daughters' and granddaughters' shares to be independent and free from all husbands their receipts alone will be a sufficient discharge to my executrixes or trustees." The testator appointed his wife and two daughters executrixes of his will, and appointed certain persons "to be my trustees to assist or cause my executrixes to be assisted to make a true and perfect inventory and valuation of all my personal and real estate in order that my children may have their just and proper shares and Government the exact duty therefrom."

The testator died on August 30, 1880. The will was proved by all the executrixes. The gross value of the personal estate was sworn at 18,326*l.* 9*s.* At the time of his death the testator was possessed of considerable freehold and leasehold property.

The testator's widow died on January 16, 1884.

Mary Margaret Jones married W. J. Lewis, and the defendant G. V. Lewis, who was born in the lifetime of the testator's widow and who had attained twenty-one, was their only surviving child.

Ellen Elizabeth Jones had been married twice, the only child of her first marriage had died in infancy, and there was no issue of her second marriage.

Mordecai John Morgan Jones married, and the defendants I. M. Jones, F. T. M. Jones, and G. T. M. Jones, all infants and born after the death of the testator's widow, were the only issue of the marriage.

This summons was taken out by the two daughters and son of the testator, and by the mortgagees of the testator's real estate, against the above-mentioned grandchildren of the testator for the determination of the questions (1.) whether the plaintiffs, the daughters and son of the testator, were entitled in fee simple or as tenants for life or in tail to the property devised by the will of the testator, or to what estate or interest therein they were entitled under the will; and (2.) whether the defendants were

entitled to any and, if so, what estates or interests in, or in any part of, the property devised by the will of the testator.

Younger, K.C., and *Crowdy*, for the plaintiffs. Apart from the fact that the subject of this gift is a mixed fund, the gift is plainly within the rule in *Wild's Case* (1), and the testator's children take as tenants in tail. The mere inclusion of personalty in the gift does not affect the application of the rule as to the realty: *Byng* v. *Byng* (2); *Bamford* v. *Chadwick* (3); *Forth* v. *Chapman* (4); *Wood* v. *Baron* (5); and in *Clifford* v. *Koe* (6) apparently there was a gift of personalty as well.

The rule in *Wild's Case* (1) is not applicable in the case of personalty: *Audsley* v. *Horn*. (7)

If the rules applicable to personalty are to be applied to the real estate in this case because there is a mixed fund, then the interests given to the testator's children and grandchildren are joint interests, and only grandchildren alive at the death of the tenant for life can take. In other words, there is an interest in common between the stirpes, and a joint interest between the parents and children. They take the whole immediately, and if there are no grandchildren the parents take their respective shares absolutely.

The only alternative to the last view is that the parents take a life estate in their shares with a remainder to their children.

[JOYCE J. No. The parents take the whole, and there is an executory bequest over of their respective shares to their children. *In re Buckmaster's Estate* (8) shews that there may be executory limitations over.]

In that case there were the additional words "or according to their wills," and they make a very material difference. In *Audsley* v. *Horn* (7) there was a bequest of leaseholds to B. and her children, and it was held that B., who had no children at the death of the testator or of the tenant for life, took, not a gift with an executory limitation over, but a life estate with

(1) 6 Rep. 16 b.
(2) (1862) 10 H. L. C. 171.
(3) (1854) 2 W. R. 531.
(4) (1720) 1 P. Wms. 663.
(5) (1801) 1 East, 259.
(6) (1880) 5 App. Cas. 447, 450.
(7) (1858) 26 Beav. 195.
(8) (1882) 47 L. T. 514.

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remainder to her children. Moreover, there cannot be an absolute gift of personalty with an executory gift over, for the latter would be void: *In re Percy* (1); *Byng* v. *Lord Strafford.* (2)

To hold that the parents take a life estate in their shares with a remainder to their children would be doing violence to the will, for when the testator wanted to give his widow a life estate he knew well enough how to do it.

Errington, for the defendant G. V. Lewis. *Wild's Case* (3) is not applicable. It is only in the event of a joint tenancy not being able to take effect that the rule in *Wild's Case* (3) applies, and that is the reason for the rule. In the present will the testator has clearly shewn that the widow's death is the time when the children and grandchildren are to take joint interests, and the words in this will bring the case within the decision in *Buffar* v. *Bradford* (4) and *Crone* v. *Odell.* (5) This defendant takes as a joint tenant or as a tenant in common.

Clifford v. *Koe* (6) turned on the terms of the gift over and is an altogether different case.

It is more to her interest that this defendant should take as joint tenant or tenant in common, but if she does not take in that way, then I submit that she takes in remainder after her parent's life estate.

Bridgeman, for the infant defendants. I submit that the rule in *Wild's Case* (3) does not apply because there is a mixed gift of realty and personalty, and also because there are indications in this will which exclude the application of the rule. An adherence to the rule would defeat the intention of the testator as collected from the whole will, and the Court should therefore disregard the rule: *Byng* v. *Byng.* (7)

I contend that the words child and children are used as words of purchase in the primary clause in the will; that it is quite clear from the later words that the granddaughters are intended to take some share; and that the only possible way of giving effect to that intention is for the parents to take an estate for

(1) (1883) 24 Ch. D. 616.
(2) (1843) 5 Beav. 558.
(3) 6 Rep. 16 b.
(4) (1741) 2 Atk. 220.
(5) (1811) 1 Ball & B. 449; on appeal, (1815) 3 Dow, 61.
(6) 5 App. Cas. 447, 454.
(7) 10 H. L. C. 171, 178.

life in their respective shares with remainder to their children. That construction was adopted in *Audsley* v. *Horn.* (1)

The mixing up of realty and personalty in the same gift shews an intention that the same rule shall operate as to both: *Genery* v. *Fitzgerald* (2); *Ackers* v. *Phipps* (3); *Bellairs* v. *Bellairs* (4); *In re Dumble* (5); *In re Burton's Will.* (6)

I submit that the testator never meant the rule in *Wild's Case* (7) to apply, but that by mixing up both real and personal estate he meant the property to follow the rule applicable to personalty, and there is quite sufficient in the will to shew that an estate tail was not intended—*Grieve* v. *Grieve* (8); *Byng* v. *Byng* (9)—but that the gift of all the property was intended to take effect as life estates to the testator's children in their respective shares with remainder to their children.

Younger, K.C., in reply.

Cur. adv. vult.

Nov. 11. JOYCE J. This is a case with respect to the construction of the will of a layman, apparently prepared without professional assistance, and, in any view of the case, incorrectly drawn. The question arises upon a direct gift of freehold and leasehold property—the amount or value of the latter being substantial if not exceeding that of the former—without the intervention of trustees after the death of the testator's widow, who took a life interest in the whole. The testator left three children, none of whom married until after his death, but one of them married and had a child born in the widow's lifetime, and another of them has had children born since the widow's death.

I will first make an observation upon the later clause in the will, which is to this effect: "In case any of my children dying and leaving no legal issue the share or shares of those dying to be given to the surviving child or children of such as will be dead." It was urged upon me in the first instance that the words "the surviving child or children of such as will be dead"

(1) 26 Beav. 195.
(2) (1822) Jac. 468.
(3) (1835) 9 Bli. (N.S). 430.
(4) (1874) L. R. 18 Eq. 510.
(5) (1883) 23 Ch. D. 360.
(6) [1892] 2 Ch. 38.
(7) 6 Rep. 16 b.
(8) (1867) L R. 4 Eq. 180.
(9) 10 H. L. C. 171.

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should be interpreted to mean the survivor or survivors of the children of the testator. To my mind that is impossible, it would be contrary to the plain meaning of the words, and the further words "My daughters' and granddaughters' shares to be independent and free from all husbands" shew clearly that the preceding words are not limited to the survivor or survivors of the children.

Now, a priori it is in the highest degree improbable, if not impossible, that a rational testator should give or devise property to a child and his or her children as a class or so as to make them take not in succession, but concurrently. In his book on the Construction of Wills the late Mr. Vaughan Hawkins says in Appendix II., p. 316, after discussing the law, "It is conceived that, notwithstanding these cases, the rule as at present established requires some aid from the context to convert the gift to the children into a gift in remainder, and that, without such aid, the force of the expressions themselves is to cause the parent and children to take concurrently. The opposite rule, however, if established, would no doubt be a convenient and probably beneficial rule of construction." And so although "where there is a bequest or a gift by deed of personalty to a person and his children, the parent and his children will rank as a class and will take absolutely according to the rules applicable to classes," yet "slight indications will be sufficient to induce the Court to hold that the intention was that the parent should take for life and the children in joint tenancy," or otherwise "in remainder" (see Underhill and Strahan on the Principles of the Interpretation of Wills and Settlements, 2nd ed. p. 222).

Now is there anything in this will to shew or to indicate that the grandchildren of the testator were not intended to take concurrently with their parents, his children? The gift is "On and immediately after my decease I give devise and bequeath whatever may be left (as soon as all claims against my estate are fully paid and liquidated) to my dear children in the following proportion namely two fifths of the whole of my estate to my son Mordecai John Morgan Jones and the other three fifths to my daughters Mary Margaret and Ellen Elizabeth in two equal shares share and share alike"; that is to say, he gives to

Mordecai two fifths of the whole, and to Mary one half of three fifths, or three tenths, and to Ellen one half of three fifths, or three tenths, thus making up the entirety. So far the will is perfectly clear, if it only stopped there, but then it goes on "and to the child or children of the three said children," under which gift at least all children of the testator's children, that is all grandchildren, born in the widow's lifetime must be admitted to share. Probably this gift "and to the child or children of the three said children" ought to be taken to apply to the children of each child respectively; that is, the original share of each of the testator's children goes to the children of that child, and I think in the argument before me all seemed to agree with that view.

Then the will goes on—I am just supplying a word or two to make it grammatical—"In case of any of my children" (not grandchildren) "dying and leaving no legal issue" there is a gift over of the share or shares of those so dying. What is the share or shares of those so dying? I cannot doubt that the share of Mordecai is his two fifths, or, as to either of the daughters, that her share is three tenths. The corpus of each child's original share, as it seems to me, is to remain intact and undivided until his or her decease. Further, I infer from this clause providing for the disposition of the shares of those children who die without issue—though it is not an absolutely necessary inference—that it was not thought necessary to make further or other provision as to the share of those who should die leaving issue than the gift to their children contained in the words "and to the child or children of the three said children"; that is to say, the prior gift to the children (as we read it) of each child. Thus it appears to me that the whole original share of the parent in the case of each of the testator's children is dealt with or is contemplated as still subsisting as undivided at the death of the child.

Upon the whole, then, there is, in my opinion, sufficient to enable me, or rather I should say to compel me, to adopt the more probable and natural construction that the children of the testator's children, that is, his grandchildren, do not take, so far as present enjoyment is concerned, until the death of their parent; that is

JOYCE J. 1909 JONES, *In re.* LEWIS *v.* LEWIS.

to say, in other words, the grandchildren, if and when they take, do so, in my opinion, in succession to their parent, and not concurrently.

To my mind, therefore, the result is that just as when in a will there is a direct gift of personalty, say chattels real, to A. for life, with remainder to A.'s children, the term vests in the legatee for life, and upon his death shifts away and vests by way of executory bequest in the children—this is stated in somewhat similar though not quite the same language in Theobald on Wills, 7th ed. at p. 647—so here it seems to me that at law each of the testator's children takes, as to Mordecai two fifths, and as to each of the daughters three tenths, with an executory bequest or limitation over, at death, of his or her share to his or her children.

Now this appears to me to be the true construction of the will without any reference to the decided cases. In *In re Palmer* (1) Lindley L.J., after speaking of *Humble* v. *Shore* (2) and the Vice-Chancellor's decision there, says: "Some other judges, following him, have construed similar wills in a similar way. The result in all those cases has been, in my opinion, to miss the intention as expressed, and, unfortunately, to defeat it without sufficient grounds. This line of cases affords a striking illustration of the mischief done by construing one will by paying too much attention to decisions on other wills. Rules of law must be attended to; but if in any case the intention of a testator is expressed with sufficient clearness to enable the Court to ascertain it, the Court ought to give effect to it in that case, unless there is some law which compels the Court to ignore it; and the mere fact that in other wills more or less like it other judges have not been satisfied as to the intentions expressed in them is not sufficient ground for defeating an intention where the Court holds it to be sufficiently expressed in the particular will which it is called upon to construe." Guided by these principles and applying myself to this will and codicil, I see no difficulty in construing it. The view that I take of this will is such as I have stated, and I am not aware of any rule or decision which compels me to take a contrary view. As to the

(1) [1893] 3 Ch. 369, 373. (2) (1847) 7 Hare, 247.

personalty, the rule in *Wild's Case* (1), which was urged upon me, clearly has no application. That is well settled. Then there is the real estate, and it is said that quoad the real estate in this gift the rule in *Wild's Case* (1) applies, and that—I do not say it is impossible—the expression "and to the children" may be read as words of purchase in reference to the personalty and as words of limitation in reference to the real estate. Whether this could possibly be so or not, I am of opinion that the rule in *Wild's Case* (1) has no application where the gift or devise to the children (here the grandchildren of the testator) would, without reference to the rule, be a gift in succession to, and not concurrently with, their parent. That, I think, is the case here. Consequently I think that none of these children is at present at all events absolutely entitled either to an estate in fee simple or in tail, but the parents are entitled at any rate for life.

There must be a declaration that no child is at present entitled to his or her share absolutely, but that such share is subject upon the death of the child to an executory bequest or limitation over to his or her children, and also subject as to the provision in this will, whatever its meaning may be (I am not now deciding its meaning), limited to take effect in case of any of the children dying and leaving no legal issue. What is to happen if one of the children dies without leaving children except in so far as provided for by the clause I have last mentioned, beginning "In case any of my children die and leave no legal issue," is not very clear. This, however, is a future question not to be decided, in my opinion, until the event happens, if it ever should happen.

Solicitors: *Royds, Rawstorne & Co.*

(1) 6 Rep. 16 b.

R. M.

JOYCE J.

1909

Dec. 3.

SHUTTLEWORTH *v.* CLEWS.

[1908 S. 4579.]

Vendor and Purchaser—Practice—Specific Performance—Default in Payment by Purchaser—Forfeiture of Deposit—Form of Order.

A contract for the sale of land contained a provision for the forfeiture of the deposit on failure by the purchaser to comply with any of the conditions of sale, giving the vendor power to resell, and providing that any deficiency in price which might happen on the resale should be paid by the purchaser to the vendor and in case of non-payment be recoverable by the vendor as liquidated damages. The purchaser paid a deposit but failed to complete the contract. In an action for specific performance the vendor moved for an order forfeiting the deposit and for liberty to resell, and in case the property should be resold for less than the contract price that the purchaser should pay to the vendor the difference between the contract price and the price realized on the resale:—

Held, that the vendor must give credit for the amount of the deposit.

The form of order in *Griffiths* v. *Vezey*, [1906] 1 Ch. 796, observed upon.

Motion.

By a memorandum of agreement dated June 30, 1908, the plaintiff agreed to sell and the defendant agreed to purchase certain premises known as the Claremont Hydropathic Establishment at Rhyl, in the county of Flint, for the sum of 7500*l*. The sale was expressed to be subject to certain special conditions and also to the general conditions of sale of the Sheffield District Incorporated Law Society, which were annexed to the agreement. Condition 2 of the general conditions was as follows: "The purchaser immediately after the sale shall pay a deposit of 10 per cent. of the purchase money into the hands of the vendor's solicitor, to be retained by him until the completion of the purchase or until the vendor shall obtain the written authority of the purchaser to the vendor's solicitor to pay the same to the vendor, or until the same shall be forfeited pursuant to the condition in that behalf hereinafter contained and the purchaser shall sign an agreement to pay the remainder of the purchase money and to complete the purchase according to the conditions of sale." Condition 12 was as follows: "If the purchaser shall fail to comply with any of the

conditions of sale his deposit shall thereupon be forfeited and the vendor shall be at liberty to resell the property at such time and in such manner and subject to such conditions as he shall think fit, and any deficiency in price which may happen on, and all expenses attending the resale shall immediately afterwards be paid by the defaulter to the vendor, and, in case of non-payment, shall be recoverable by the vendor as liquidated damages."

At the foot of the conditions was the following memorandum: "I hereby acknowledge that on the sale by auction this day of 19 of the property comprised in the annexed particulars of sale I was the highest bidder and was declared the purchaser of lot thereof subject to the accompanying conditions of sale at the price of and that I have paid the sum of by way of deposit and in part payment of the said purchase money to the vendor's solicitor and I hereby agree to pay the remainder of the said purchase money and to complete the said purchase according to the said conditions of sale."

The defendant paid to the plaintiff the deposit of 700*l.*, but having subsequently failed to complete the purchase, the plaintiff commenced this action for specific performance.

The plaintiff now moved for a declaration that the defendant's deposit money of 700*l.* had been forfeited and that the vendor was at liberty to resell the property. The plaintiff also asked for an order that in case the property should be sold for less than 7500*l.* the defendant should pay to the plaintiff the difference between the said sum of 7500*l.* and the amount at which the property should be resold, together with the expenses of such sale; and that in the default of the defendant not making such payment to the plaintiff after such sale the plaintiff should recover against the defendant the amount of such difference and the said expenses by way of liquidated damages.

The right to this relief was founded upon the order made in *Griffiths* v. *Vezey*. (1)

Gilbart-Smith, for the plaintiff.

Hughes, K.C., and *Chetwynd Leech*, for the defendant. We do not deny the plaintiff's right to forfeit the deposit, but if he resells

(1) [1906] 1 Ch. 796.

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under the order he must give credit for the 700*l.* in calculating the amount of the difference to be paid by the defendant in the event of the property being resold for less than 7500*l.*

The form of the order in *Griffiths* v. *Vezey* (1) appears to be wrong. The point was not before the Court in that case. Payment of the deposit is payment of part of the purchase-money: *Ockenden* v. *Henly* (2); *Howe* v. *Smith.* (3)

The question is, What is the deficiency in price? We submit it is the difference between what the vendor gets on a resale and the amount of the unpaid purchase-money.

Gilbart-Smith in reply. Clause 12 gives the vendor two remedies—(1.) forfeiture of deposit, and (2.) power to resell. These two remedies are cumulative.

Cotton L.J. in *Howe* v. *Smith* (3) says that the deposit is a guarantee that the contract shall be performed. If on the default of the purchaser the contract goes off, then he can have no right to recover the deposit.

Joyce J. It is quite clear that in calculating the deficiency to be paid by the purchaser on a resale credit must be given by the vendor for the amount of the deposit which he has received. I do not understand how the order in *Griffiths* v. *Vezey* (1) came to be drawn up in the form in which it appears in the report, but the point raised here appears not to have been brought to the attention of the Court in that case.

Solicitors: *Church, Rendell & Co., for W. Smith & Sons, Sheffield; A. R. & H. Steele, for Eddowes & Son, Derby.*

(1) [1906] 1 Ch. 796. (2) (1858) E. B. & E. 485.
(3) (1884) 27 Ch. D. 89.

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SWINFEN EADY J.

[1909 C. 1669.]

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Nov. 26, 27; *Dec.* 1.

Company—Ultra vires—Association not for Profit—Gratuitous Payment—Pension to retired Officer—Memorandum of Association—Board of Trade Form—Construction—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 23—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 20.

The Cyclists' Touring Club was registered as an association not for profit by licence of the Board of Trade under s. 23 of the Companies Act, 1867, now replaced by s. 20 of the Companies (Consolidation) Act, 1908.

Clause 4 of the memorandum of association, a clause required by the Board of Trade as a condition of granting a licence, provided as follows:

"The income and property of the club, whencesoever derived, shall be applied solely towards the promotion of the objects of the club as set forth in this memorandum of association, and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit to the members of the club.

"Provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officers or servants of the club, or to any member of the club or other person in return for any services actually rendered to the club":—

Held, on the construction of this memorandum, that the grant of a pension by way of gratuity to a retired secretary was intra vires.

Principles stated in the trading company cases, *Small* v. *Smith*, (1884) 10 App. Cas. 119, 129; *Taunton* v. *Royal Insurance Co.*, (1864) 2 H. & M. 135, 141; and *Hutton* v. *West Cork Ry. Co.*, (1883) 23 Ch. D. 654, 671, discussed and applied.

ORIGINATING SUMMONS.

This was a summons under Order LIV.A of the Rules of the Supreme Court to determine whether upon the true construction of the memorandum of association of the Cyclists' Touring Club the said club had power out of its funds, and in particular out of the income of the investments representing the reserve funds of the said club, to provide and pay an annuity of 78*l.* to E. R. Shipton, the late secretary of the said club, during his life, and to set aside and specifically appropriate for that purpose during the life of the said E. R. Shipton such portion of the said

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investments as might be required to produce by the annual income thereof the said annuity.

The club, which was founded in 1878, was incorporated in 1887 as an association not for profit by licence of the Board of Trade under s. 23 of the Companies Act, 1867.

The liability of the members was limited by guarantee. The memorandum of association provided (inter alia) as follows:

"3. The objects for which the club is established are:

"(*a*) To provide, assist, and protect the use of bicycles, tricycles, and other similar vehicles on the public roads.

"(*b*) To provide legal assistance for the riders of bicycles, tricycles, and other similar vehicles in the enforcement of their rights to use the public roads.

"(*c*) To promote the comfort and safety of its members while touring on bicycles and tricycles by collecting and furnishing the necessary information for the planning and conduct of cycling tours, and by publishing and supplying to its members road books, maps, periodicals, or newspapers, and by providing a suitable uniform and badge for any member at his or her cost, and by arranging for suitable hotel accommodation for its members at their own cost."

"4. The income and property of the club, whencesoever derived, shall be applied solely towards the promotion of the objects of the club as set forth in this memorandum of association, and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit to the members of the club.

"Provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officers or servants of the club, or to any member of the club or other person in return for any services actually rendered to the club.

"5. The fourth paragraph of this memorandum is a condition on which a license is granted by the Board of Trade to the club in pursuance of s. 23 of the Companies Act, 1867.

"6. If any member of the club pays or receives any dividend, bonus, or other profit in contravention of the terms of the fourth paragraph of this memorandum his liability shall be unlimited."

There were about 21,000 members in the club.

In 1907 E. R. Shipton, the paid secretary of the club and editor of the *Cyclists' Touring Club Gazette*, retired after about twenty-five years' service.

The question of granting him a pension was mooted, and at a general meeting on June 12, 1908, it was resolved by 76 votes against 54 that the club should make a grant. This was confirmed in September, 1908, by a postal vote of 3668 votes against 2933, the whole club being circularized. At a general meeting on November 13, 1908, it was unanimously resolved that a pension of 78*l.* a year be granted. At a general meeting on January 15, 1909, a resolution increasing the pension to 150*l.* a year was carried on a poll by 134 votes against 132. A postal vote of the whole club was then taken on the question whether the pension should be 150*l.* or 78*l.* a year. The result of this postal vote was that 4294 members voted for a 78*l.* pension and 2003 for a 150*l.* pension. Before acting on the vote of the majority the council of the club desired to be assured that the granting of the pension was authorized by the memorandum of association.

This summons was issued to determine the point, a member, Hopkinson, being made a defendant to argue the question of construction.

Gore-Browne, K.C., and *Cann*, for the plaintiff club. The grant of the pension, though gratuitous, is not ultra vires: *Henderson* v. *Bank of Australasia.* (1)

[SWINFEN EADY J. That was a trading company. Is there any decision in the case of an association not for profit?]

There is no decision, but in *Yates* v. *Cyclists' Touring Club* (2) there is a clear dictum by Neville J. on clause 4 of this very memorandum. The secretary was suing the club for three months' salary in lieu of notice on his retirement. The council proposed to pay it to put an end to the action, and Yates, a member, moved to restrain them. The club contended that the payment was intra vires both as a gratuity and by way of compromise. Neville J. said: "I think the proposed payment

(1) (1888) 40 Ch. D. 170. (2) (1908) 24 Times L. R. 581, 582.

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was within the powers of the council. In the first place, I think that clause 4 of the memorandum of association is intended to prevent the direct or indirect payment or division of any part of the profits of the club amongst its members, and if the council had determined to reward the services of a secretary, who had tendered his resignation, which had been accepted, by a donation, it appears to me that that would have been within the powers of the council in the present case. But upon the evidence I do not think that was the intention of the council at all, and therefore I do not decide the case in the way that I am doing upon that ground." He then decided that the payment was valid by way of compromise. It is submitted that this is the correct construction of the first paragraph of clause 4, but if there is any difficulty Mr. Shipton is prepared to resign his membership.

Hon. Frank Russell, K.C., and *Arthur Sims*, for the defendant. The fact that this is an association not for profit distinguishes the present case from the trading company cases. The principle of giving gratuities to servants in a trading company is that it spurs them to exertions to get a good profit and is therefore a reasonable mode of carrying on the business for the purpose of making it most profitable as a going concern : *Hutton* v. *West Cork Ry. Co.* (1) In the same way an insurance company may pay losses not strictly covered by the policy with a view of securing custom : *Taunton* v. *Royal Insurance Co.* (2) In that case the general practice of insurance companies was proved, as pointed out by Kay J. in *Tomkinson* v. *South Eastern Ry. Co.* (3) Kay J. thought the insurance case had carried the doctrine to the very verge to which it ought to go. He declined to extend the doctrine to the case of a railway company subscribing to the Imperial Institute and said, "To say that . . . . any expenditure which may indirectly conduce to the benefit of the company is intra vires, seems to me extravagant."

Similarly in *Henderson* v. *Bank of Australasia* (4) it was proved that it was usual for banks to grant gratuities to the widows and families of deceased officers, and if the bank in

(1) 23 Ch. D. 654, 665.
(2) 2 H. & M. 135.
(3) (1887) 35 Ch. D. 675, 679, 680.
(4) 40 Ch. D. 170.

question did not do so, it would tend to weaken the efficiency of the staff and be injurious to the shareholders' interests. In other words, the payments were conducive to the profits of the company as a trading company.

These considerations do not apply to an association not for profit. This is made extra clear by clause 4 of the memorandum. No portion of the club's property shall be paid "directly or indirectly" by way of dividend, bonus, "or otherwise howsoever" by way of profit to the members. In *Bray* v. *Ford* (1) the similar clause forbade payments "by way of profit to the persons who at any time are or have been members of the association, or to any of them." This disentitled a solicitor member to charge profit costs, though possibly the association might have allowed them as remuneration under the corresponding proviso. The association in that case was apparently registered about 1875. (2) Having regard to clause 6, it is clear that the word "members" must be read "members or member," and the payment is forbidden by the first part of clause 4. This difficulty cannot now be cured by Mr. Shipton resigning his membership. The payment is therefore ultra vires unless it can be brought within the proviso. Now this payment is not remuneration in return for services actually rendered. It is a mere sentimental gift to an old servant who has already been paid his salary in full. It is therefore not within the proviso.

Gore-Browne, K.C., in reply. The general principle is best stated in *Small* v. *Smith* (3), namely, that things incidental to the expressed main purpose and not expressly prohibited are prima facie intra vires. Now the grant of a pension to an old servant is not expressly prohibited. In the case of a club of this nature generosity to an old servant is really a form of selfishness, though not dictated thereby. It involves competition of a higher stamp for the vacant place. There is no reported decision in which the doctrine has been applied to an association not for profit. But the principle does not depend on profit. The question is what are the objects of the association? If profit is the object, it must, no doubt, be shewn that the gratuitous payment directly

(1) [1896] A. C. 44. (2) [1896] A. C. 50.
(3) 10 App. Cas. 119, 129.

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or indirectly conduces to profit. If the object is the promotion of bicycling, it must be shewn that the payment assists that object. It is manifest here that clause 3 (*c*) requires a very able and energetic secretary and editor to carry out its objects, and treating him generously on his retirement is a great aid in filling his place satisfactorily.

The present clause is less stringent than the older form in *Bray* v. *Ford*. (1) Sect. 23 of the Companies Act, 1867, now s. 20 of the Companies (Consolidation) Act, 1908, merely requires the association to satisfy the Board of Trade that it intends to apply its profits or income "in promoting its objects, and to prohibit the payment of any dividend to its members," but the Board of Trade may impose additional conditions on granting their licence, and clause 4 has been varied from time to time.

In any case the proviso cannot extend the operation of the first paragraph of clause 4 to past members. The old form expressly included past as well as present members and prohibited payment by way of profit to them "or to any of them." This has been altered, and the present form merely prohibits payment by way of profit to the members of the club as such. It does not prohibit individual rewards for past services. In any case the proposed pension falls within the proviso.

SWINFEN EADY J. This is a summons under Order LIV. A of the Rules of the Supreme Court to determine a question of construction, and of construction only, upon the memorandum of association of the plaintiff club. That question is whether upon the true construction of the memorandum the club has power out of its funds, and in particular out of the income of the investments representing the reserve funds, to provide and pay an annuity of 78*l.* to Mr. Shipton, the late secretary, during his life, and to set aside and specifically appropriate to that purpose during his life such portion of the said investments as may be required to produce by the annual income thereof the said annuity. So that in substance the question is whether it is within the power of the club to pay an annuity to Mr. Shipton.

(1) [1896] A. C. 44.

If it is, it would follow that the club is empowered to set aside funds, in order to make due and proper provision for the payment. Can the club pay an annuity, or pension, to a former servant? Although Mr. Shipton is still a member of the club, I was told that he would resign membership, if the fact of his being a member alone prevented the club from paying him.

The club in question is the Cyclists' Touring Club, and it was formed for the promotion of cycling and other ancillary objects set forth in the memorandum. The club was desirous of obtaining limited liability, but without the use of the word "limited" as part of its name. An application was made to the Board of Trade for their licence under s. 23 of the Companies Act, 1867, and the licence was granted upon the terms embodied in the memorandum. Clause 4 of the memorandum provides that "The income and property of the club, whencesoever derived, shall be applied solely towards the promotion of the objects of the club as set forth in this memorandum of association, and no portion thereof shall be paid or transferred, directly, or indirectly, by way of dividend, bonus, or otherwise howsoever by way of profit to the members of the club."

Now I deal with this case first upon the footing that Mr. Shipton is a non-member, because, if necessary, he will become a non-member. So far there is nothing to prohibit the particular payment because it is only "by way of dividend, bonus, or otherwise howsoever by way of profit to the members of the club." If he is not a member he is not within the restriction. Then comes the proviso: "Provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officers or servants of the club, or to any member of the club or other person in return for any services actually rendered to the club."

It is difficult to see what the meaning of the words "or other person" is in that sentence. The prohibition in clause 4 is only a prohibition against payment to the members of the club. It may be that the proviso is only inserted to make it clear that, whether a person is a member of the club or not, it is not intended to prohibit the payment of remuneration for services rendered. In one sense the payment contemplated is a

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payment in respect of services actually rendered, because it is a payment to an old servant of the club by reason of his past services; but on the other hand it is a payment to a servant who has been paid all that is legally due to him in respect of his past services.

Sect. 23 of the Companies Act, 1867, now replaced by s. 20 of the Companies (Consolidation) Act, 1908, is directed against the payment of any profit to members of an association registered thereunder. A distinction is drawn between a company formed for profit and a company or association not formed for the purpose of making profit divisible amongst the members, but for the purpose of promoting various useful objects, artistic, religious, charitable, or otherwise. With reference to associations formed to promote useful objects this provision is intended to prohibit the distribution of any pecuniary profit as such amongst the members as such, by way of dividend, or bonus, or in any other shape or form. It is not intended to prohibit any payment made for value, and it is certainly not intended to prohibit payments made for services rendered.

In the construction of the memorandum I think I may refer to the speech of Lord Selborne in *Small* v. *Smith*. (1) He says: "When you have got a main purpose expressed and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, prima facie, to follow from the authority for effectuating the main purpose by proper and general means." Now, in my opinion, there is no express prohibition against a voluntary payment in respect of past services. The question has apparently not arisen before in associations not for profit, but similar questions have arisen with regard to trading companies. The leading case is *Taunton* v. *Royal Insurance Co.* (2) In that case the company proposed to satisfy a claim that could not have been legally enforced, and it was urged that the payment ought not to be made. Wood V.-C. put the matter in this way: "It is one thing to say that the directors are paying something which they are not bound to pay, and quite another thing to say that

(1) 10 App. Cas. 119, 129.

(2) 2 H. & M. 135, 141.

they are making payments for purposes not within the objects of the company. In this case the answer of the directors is, that they make the payments as the course most conducive to the objects and the interests of the company."

In my opinion, in promoting the objects of a club such as the present one, it is most desirable to encourage faithful service amongst the officers and servants. This is a club with some 20,000 members, and it must obviously rely in great measure upon the services of its employees. It is of as much importance to a club as to a trading company to be able to hold out such inducements to officers and servants as will secure the best assistance. In *Hutton* v. *West Cork Ry. Co.* (1) the company had sold its undertaking to another company and was no longer a going concern, but only existed for winding-up purposes. Bowen L.J. in discussing the right of a company to make gratuitous payments said: "Bona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational. The test must be what is reasonably incidental to, and within the reasonable scope of carrying on, the business of the company. . . . . They are not to keep their pockets buttoned up and defy the world unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is bona fide, but whether, as well as being done bona fide, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit."

In my opinion, the payment to a retired servant of the club by way of an annuity, or by way of pension, or by way of gratuity, is within the powers of the club as being a payment in furtherance of the best objects of the club. The fact that the payment is made by way of gratuity and not under any legal liability does not make it a payment outside the objects of the club. Without expressing any opinion at all upon the merits, which are not before me, I am of opinion that it would be too narrow a

(1) 23 Ch. D. 654, 671.

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construction of the memorandum to say that payments for services actually rendered are limited to payments legally due under legal contracts. Under the head of a payment for services actually rendered a gratuity in respect of past long and faithful services may be awarded. On this ground I determine that according to the true construction of the memorandum the club has power to pay this pension out of its funds, and to set aside funds for that purpose.

This payment is not a payment to a member as such, or because he is a member. It is a payment to a person because he has rendered services to the company, and in my opinion it is not necessary for Mr. Shipton to resign his membership to enable the club to pay him this pension or to entitle him to accept it.

Solicitors: *Petch & Co.; T. Lamartine Yates.*

G. R. A.

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In re INNES. INNES *v.* INNES.

[1909 I. 1178.]

Administration—Executor—Imperfect Gift of Personalty—Indefinite Gift—Promise to pay in the Future — Continuing Intention to give—Donee appointed one of Donor's Executors—Perfected Gift.

The plaintiff lived with and kept house for her father, and frequently asked him to pay her a salary as housekeeper. In 1902 he gave her a document, whereby he declared that from and after September 30, 1902, she should receive from his business 2*l.* per week, or about fifty-two sums of equal amount per annum, and also an additional sum of 2*l.* a week, to remain in the business, and to be withdrawn by her, if necessary, after an investment lasting for five years, with increase of 5 per cent. per annum. The 2*l.* a week was never paid, but she received from her father various sums amounting to 78*l.* 10*s.* In 1905, at his request, she gave back the document so that he might consult a solicitor about it and see that there should be no doubt of her getting the money; and she found it amongst his papers after his death. By his will the father appointed the plaintiff to be an executrix and directed that his estate should be equally divided between his children.

The plaintiff issued this summons for a declaration that she was entitled as a creditor to have the amounts specified in the document paid to her out of the estate, or that her father had constituted himself a trustee of the property specified in the document, or, thirdly, that the gift of the document coupled with her appointment as executrix was a complete gift of the amounts specified in the document:—

Held, on the evidence, that the plaintiff was not a creditor of the testator's estate in respect of the sums mentioned in the document; that the testator had not constituted himself a trustee of them for her; and, on the third point, that the rule laid down in *Strong* v. *Bird*, (1874) L. R. 18 Eq. 315, and extended by *In re Stewart*, [1908] 2 Ch. 251, ought not to be further extended so as to be applicable to a mere promise to pay an indefinite sum at a future time.

THIS was a summons taken out by Elizabeth Mary Innes, spinster, asking for (1.) a declaration that she was under or by virtue of a document dated July 21, 1902, and signed and given to her by her father, John Innes, deceased, in consideration of acting as his housekeeper, entitled as a creditor of his estate to have paid to her out of the estate the amounts specified in the document, or in the alternative (2.) a declaration that her father had by the document declared and constituted himself a trustee of the property specified in it for her benefit, or in the alternative (3.) a declaration that the gift of the document by her father taken with the circumstances under which it was given and her appointment as his executrix was a complete gift by him to her of the amounts specified in the document.

The plaintiff was the eldest child of John Innes, who had also two other daughters and two sons. From 1884 till his death on May 4, 1907, the plaintiff took charge of and kept house for her father. In 1895 he settled some property on his three daughters, and in 1896 and 1897 the plaintiff's sisters were married. The father used to pay all the household expenses, and from the date of the settlement the only money that the plaintiff had for dress, pocket money, and personal expenses was her share of the income of the settled property. She frequently spoke to her father about the insufficiency of her income, pointed out the difference between her position and that of her sisters, who had husbands to provide for them, and told him that he ought to allow her a salary as his housekeeper. He agreed with her, and in July, 1902, said that he was going to do something for her.

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On July 21, 1902, he produced a document in the following terms :—

"From Innes Smith & Company,
Wine Merchants,
83, High Street, Birmingham.
July 21st, 1902.

"I, John Innes hereby determine and declare that from and after the 30th September next ensuing (1902) Elizabeth Mary Innes my daughter shall receive from the business of Innes Smith and Company 83 High Street Birmingham the sum of 2*l.* per week or about 52 sums of equal amount per annum And also an additional sum of the same amount per week or per annum the latter amount of cash to remain in the business of Innes Smith and Company at five per cent. per year to be withdrawn by her if necessary after an investment lasting for five years with increase of five per cent. per annum.

"John Innes.

"Witness to signature
"A. Dobbin."

He put the document into an envelope and gave it to her, whereupon she read it, said the allowance was larger than she expected, and asked him if he really meant it. He replied that he did not do these things unless he meant them. She took the document and kept it for some time, but did not draw anything regularly, though she occasionally received various sums amounting altogether to 78*l.* 10*s.* from her father. In 1905 her father asked her to let him have the document so that he might consult a solicitor and see that there should be no doubt of her getting the money. She gave it to him, he kept it for about six months, and she found it amongst his papers after his death.

By his will, dated June 19, 1894, the father, subject to payment of his debts and funeral and testamentary expenses, gave to the plaintiff and his son E. A. Innes (whom he thereby appointed trustees and executors of his will) all his estate and effects, and directed his trustees (in the events which had happened) to realize his estate and divide the proceeds equally amongst all his children. The testator died on May 4, 1907, leaving an estate worth about 80,000*l.*

A. Grant, K.C., and *Whitty*, for the summons. The evidence shews that there was a contract by the plaintiff to act as her father's housekeeper, and by the father to pay her for doing so the sums mentioned in the document of July 21, 1902. She is therefore entitled as a creditor to retain those sums out of his estate. Secondly, if the Court should be of opinion that an actual contract has not been proved, we submit that Mr. Innes constituted himself a trustee of these sums for the plaintiff. Thirdly, the plaintiff's claim comes within the rule stated in *Strong* v. *Bird*. (1) There was a clear intention to give this money, a continuing intention to do so, and a completion of the legal title by her appointment to be his executrix. In that case the gift was the release or attempted release of a debt; but the doctrine has been held to apply so as to perfect an imperfect gift of bonds: *In re Stewart* (2); *In re Griffin*. (3)

[PARKER J. In the present case there is at most only a promise to pay an indefinite sum.]

No doubt transfer is essential to a gift, but this doctrine is an exception which has been grafted on to the rule. If the animus donandi is present the gift is completed by the appointment of the donee to be executor.

[PARKER J. There must be a present gift although it is imperfect.]

A promise to pay next year would be sufficient if the donor survived till that time and his intention to give continued. The money which was accumulated in the business was actually given to the plaintiff, and every week there was a present gift of 2*l*. The testator's estate has come into her hands and she is entitled to retain these sums. The decision in *Vavasseur* v. *Vavasseur* (4) is not opposed to our contention, for in that case there was no present intention to give.

Romer, K.C., and *L. Byrne*, for the respondents, were not called upon to argue.

PARKER J. stated the facts, and continued:—It appears to me that I cannot find on the evidence that there was a contract by

(1) L. R. 18 Eq. 315.
(2) [1908] 2 Ch. 251.
(3) [1899] 1 Ch. 408.
(4) (1909) 25 Times L. R. 250.

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the plaintiff to serve her father as his housekeeper, or a contract on his part to pay her a definite sum. The fact that she acted as his housekeeper was put forward by her as a reason for increasing her personal allowance; it was an arrangement between father and daughter, but not a contract at all. He recognized that she was in a position where a larger allowance would have been justifiable, and he therefore wrote a letter, and by that letter he promised her certain advantages. In my opinion there was no contract. He simply and solely promised to grant her a larger allowance, and as a matter of fact the promise was never acted upon to its full extent, though she did from time to time receive certain sums. Under these circumstances it is impossible to hold that the plaintiff is a creditor of the estate.

That part of my decision turns really upon a question of fact, but another point which is raised is one partly of fact and partly of law. It has been held in the case of *Strong* v. *Bird* (1) that where a testator has attempted to forgive a debt by telling his debtor that the debt is forgiven, though that cannot at law operate as a release, yet there is a present intention of giving, which, if the debt is subsequently released, may be effectual, and that the appointment of the debtor subsequently as an executor is a sufficient release at law to give validity to the gift which was otherwise imperfect. That is a decision of Sir George Jessel in 1874, and it has been acted upon, I think, ever since, and recently has been somewhat extended by a decision of Neville J. in *In re Stewart*. (2) The way in which the principle enunciated by Sir George Jessel has been extended is that it has been made, according to Neville J.'s decision, applicable not only to the release of a debt, but in order to perfect an imperfect gift of specific property. In the case of *In re Stewart* (2) the testator had given his wife certain bonds and other securities, as to which there was no doubt, and these securities had been enumerated in a document at the foot of which the testator had written, in pencil, "Coming in next year 1000*l*.," and on the evidence Neville J. construed those words as an announcement of the intention to give a further 1000*l*. to his wife the next year. It appears that one of the bonds which had been handed over was

(1) L. R. 18 Eq. 315.

(2) [1908] 2 Ch. 251.

paid off, and 500*l.* came, in respect of it, into the hands of the testator. In reinvesting that next year he added rather over 1000*l.* to it and bought three further bonds. He took the contract note for those three further bonds to his wife, and he handed it to her in an envelope with the broker's letter announcing the purchase, and he said "I have bought these for you." Neville J. held that that was a present intention to give which would have operated as a gift but for the fact that certain things remained to be done which were not done, so that the gift was imperfect. But the testator subsequently died, having appointed his wife his executrix, and Neville J. held that the principle of *Strong* v. *Bird* (1) was applicable, and that, there having been an actual attempted gift, imperfect though it might have been, the subsequent appointment of the lady as executrix perfected that gift by vesting in her the legal interest in the property which was the subject of the action.

It is attempted here to extend the doctrine of those cases still further. In the first place it is attempted to extend it to what, if there was a gift at all, was a gift of money without that money being identified, or sufficiently identified to enable it to be separated from the rest of the estate of the testator; and in the second place it is attempted to extend the principle of the earlier cases not only to an actual attempted gift which as a matter of fact is imperfect, and therefore will not take effect unless it is subsequently perfected, but to a mere promise to give on a future occasion.

In my opinion the principle of *Strong* v. *Bird* (1) and *In re Stewart* (2) and other similar cases ought not to be so extended. What is wanted in order to make that principle applicable is certain definite property which a donor has attempted to give to a donee, but has not succeeded. There must be in every case a present intention of giving, the gift being imperfect for some reason at law, and then a subsequent perfection of that gift by the appointment of the donee to be executor of the donor, so that he takes the legal estate by virtue of the executorship conferred upon him. It seems to me that it would be exceedingly dangerous to try to give effect by the appointment of an executor

(1) L. R. 18 Eq. 315. (2) [1908] 2 Ch. 251.

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to what is at most an announcement of what a man intends to do in the future, and is not intended by him as a gift in the present which though failing on technical considerations may be subsequently perfected.

I think I ought to say that my attention has been called to the case of *Vavasseur* v. *Vavasseur* (1), where apparently Channell J. took the same distinction between a promise to give in the future and an attempted actual gift in the present which I have taken in the course of my judgment.

There is a third suggested way in which the plaintiff might claim, and that is by way of declaration of trust; but I do not think that was really seriously argued. The difficulty of arguing that there is a declaration of trust in the present case is that there is really no specific property to which that declaration of trust could relate. Therefore I need not deal further with the matter.

Solicitors: *Needham, Tyer & Barrow, for Alfred Caddick & Son, West Bromwich; Helliwell, Harby & Evershed, for Charles E. Innes, Birmingham.*

(1) 25 Times L. R. 250.

H. C. R.

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NEVILLE J.

1909

Oct. 10, 11, 13.

[1907 S. 4345.]

Stock Exchange—Broker and Client—Purchase of Shares—Carrying over—Broker's Remuneration added to Contango—Non-disclosure to Client—"Net" rate—Account for Secret Charge—Deposit of Shares by way of Equitable Mortgage—Blank Transfer—Exercise of implied Power of Sale—Reasonable Notice to Mortgagor.

In November 1904, the plaintiff instructed brokers on the London Stock Exchange to buy certain mining shares for him, it being understood that the shares were not to be taken up on the settling day, but were to be carried over. No agreement was made as to the remuneration of the brokers for arranging the carry over. The brokers bought the shares from a jobber, and in the bought notes sent by them to the plaintiff they charged an opening commission of 1*s.* per share. The brokers arranged the carry over with the jobber, and the contract note of the first carrying over sent by them to the plaintiff contained a charge of "8½*d.* net." The shares were carried over in this way every fortnight until January, 1906, the "net" rate varying with the market price of the shares. The plaintiff having failed to pay the balance against him on the mid-October, 1905, carry over, they pressed for payment, and the plaintiff deposited with them as security a certificate for 390 gas shares and signed a blank transfer of the same. The fortnightly balances continued adverse to the plaintiff and were not paid by him, and in January, 1906, the brokers closed his account with a balance of 69*l.* 10*s.* against him and sold the 390 gas shares for 162*l.* 10*s.*

Throughout the above transactions the plaintiff thought that he would be charged an opening and closing commission by the brokers and that the "net" rate charged for every carry over represented only the jobber's contango, but it included also in fact a charge by the brokers for arranging the carry over which they did not disclose to the plaintiff. It appeared that the "net" rate was well known on the Stock Exchange to indicate that in the jobber's contango was included the broker's remuneration, and that the charge the brokers had so made was reasonable. In an action by the plaintiff against the brokers for an account and payment of the undisclosed charge they had made on every carry over, and for damages in having recklessly and without due regard to his interests sold the whole of the 390 gas shares :—

Held, that the principle of *Salomons* v. *Pender*, (1865) 3 H. & C. 639, and *Andrews* v. *Ramsay & Co.*, [1903] 2 K. B. 635, applied, and that the brokers were bound to account for the secret charge they had made and were not entitled to any remuneration for carrying over the shares.

But *held*, that the brokers had, under the circumstances, exercised

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their implied power of sale over the gas shares reasonably and after due notice to the plaintiff, and that he was not entitled to any relief in that respect.

ACTION.

The defendants were a firm of brokers on the London Stock Exchange carrying on business under the style of Slater & Bond. The plaintiff was a metal merchant at Liverpool, and at the end of November, 1904, he instructed the defendants through a Mr. Mounsey to purchase on his behalf fifty Gold Fields ordinary shares and fifty East Rand Proprietary shares for the next settling day, December 15. It was understood, however, that the shares were not to be taken up, but were to be carried over. The defendants accordingly bought the shares from a jobber on the Stock Exchange, and the bought notes sent by the defendants to the plaintiff were in common form, and therein the defendants charged the plaintiff a commission of 1*s.* per share, which was a usual charge to make in opening such an account. On December 13, 1904, the defendants sent the plaintiff a contract note of the continuation account which they had arranged, and which, omitting formal parts, was as follows:

"Dear Sir,—We beg to advise continuation on your account of the under-mentioned stocks, subject to the rules of the London Stock Exchange.

Bought for Settlement 30th inst. Sold for 15th inst.

		Price.	Amount.			Price.	Amount.		
			£	*s.*	*d.*		£	*s.*	*d.*
50	East Rand . .	$9\frac{1}{16}$ $8\frac{1}{2}d.$ net	454	17	11	$9\frac{1}{16}$	453	2	6
50	Gold Fields .	$8\frac{1}{16}$ $8d.$,,	404	15	10	$8\frac{1}{16}$	403	2	6
		Duty . .		4					,,

The item "$8\frac{1}{2}d.$ net" in the above account meant the contango, i.e., the jobber's charge for carrying over the shares, plus a small charge by the brokers (the defendants) for arranging the carry over, but the plaintiff was not aware of this and thought that the "$8\frac{1}{2}d.$ net" was only the contango. The shares were carried over in this way every settling day, the "net" rate varying with the market price of the shares, until January, 1906, when the account was closed as after stated.

The balances on the fortnightly accounts were generally against the plaintiff, and he paid them until the mid October, 1905, account, which shewed a balance of 43*l.* 10*s.* due from him, which he failed to pay. The defendants pressed for payment, and he thereupon deposited with them as security a certificate for 390 shares of the Incandescent Heat Syndicate, Limited, and at the same time signed and handed to them a blank transfer of the shares, and promised but again failed to pay the account. The fortnightly accounts continued adverse to the plaintiff during November and December, 1905, and the beginning of January, 1906, and the balances due from him remained unpaid. On November 30, 1905, the defendants by Mr. King, one of their clerks, had written the plaintiff as follows:

"As we have not received your promised cheque for balance of account due I regret I must close the shares open and also dispose of the Incandescent Heat Syndicate shares (which you have left here as security) for what they will fetch to meet the debit balance";

and they wrote him letters to the same effect on December 14, 1905, and January 6 and 13, 1906.

On January 11, 1906, the defendants closed the continuation account with a balance of 69*l.* 10*s.* against the plaintiff, and on January 17, 1906, they sold the 390 Incandescent Heat Syndicate shares to a Mr. Boyd for 162*l.* 10*s.* The same day, January 17, the defendants wrote the plaintiff that they had closed his account and had sold the Incandescent Heat Syndicate shares. The plaintiff replied the next day, repudiating the sale and stating that he should hold them responsible in damages for any loss that he might sustain, and at the same time he gave notice to the liquidator of the Incandescent Heat Syndicate, Limited (which was in process of reconstruction), not to recognize or register any transfer of his shares. The balance of the 162*l.* 10*s.* (after the defendants' debt was satisfied) remained in their hands and was eventually garnished by a creditor of the plaintiff. In the closing account of the mining shares sent by the defendants to the plaintiff on January 17, 1906, a closing commission was not charged, and this aroused his suspicions. He then made inquiries and ascertained for the first time that the "net" rate

NEVILLE J. included a charge by the brokers for carrying over the shares of which they had not informed him and to which he had not agreed.

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In June, 1906, the liquidator of the Incandescent Heat Syndicate, Limited, took out an interpleader summons with respect to the plaintiff's 390 shares, to which the plaintiff and Mr. Boyd were made parties. The summons was heard in July, 1907, and decided against the plaintiff on the ground that Mr. Boyd was a purchaser for value without notice. The plaintiff then brought the present action against the defendants claiming an account of all the transactions between himself and the defendants, an account and payment of the secret profit made by the defendants in carrying over the mining shares, and damages for wrongfully converting and selling the gas shares recklessly and without due regard to his interests. The defendants by their defence alleged (but failed to prove) a verbal arrangement with Mounsey on behalf of the plaintiff to charge him a net rate instead of half commission for carrying over the shares, the result of which was that, instead of receiving an aggregate commission for carrying over the shares of 59*l.* 7*s.* 6*d.*, they received as commission therefor 17*l.* 17*s.* 10*d.*, and that the plaintiff was at all times aware that the net rate was being charged and that it included their commission; and by way of counter-claim the defendants alleged that by the practice of the Stock Exchange they were entitled to charge a commission of ½ per cent. for carrying over the shares, amounting in the aggregate to 59*l.* 7*s.* 6*d.*; that except the 17*l.* 17*s.* 10*d.* they had received no part of the 59*l.* 7*s.* 6*d.*, and the balance thereof 41*l.* 9*s.* 8*d.*, was due to them; alternatively they alleged they were entitled to reasonable remuneration for carrying over the shares, and that such remuneration would considerably exceed the 17*l.* 17*s.* 10*d.* actually received by them and would amount to 59*l.* 7*s.* 6*d.*, and they claimed payment of the 41*l.* 9*s.* 8*d.*, or, alternatively, whatever sum might be allowed as reasonable remuneration for carrying over the shares.

It appeared from the evidence of a member of the Stock Exchange that a jobber in carrying over shares charged, either a commission, or a percentage calculated in pence per share,

equivalent to interest for fifteen days; that a broker in a speculative transaction like the plaintiff's was entitled to charge an opening and closing commission, but it was usual instead thereof to charge on the carry over a commission of $\frac{1}{2}$ per cent. or a net rate; that the net rate was well known on the Stock Exchange to represent the jobber's contango plus a small charge for the broker's remuneration; and that where a net rate was charged a closing commission was not charged.

Butcher, K.C., and *E. Lunge*, for the plaintiff. The defendants were entitled to charge an opening and closing commission, but could not also make a charge for all the intermediate continuation accounts. It was their duty as the brokers of the plaintiff to pass on to him in its entirety the continuation contract they made with the jobber, shewing the exact charge made by the jobber, and they could not charge any remuneration for themselves for carrying over the shares without a definite agreement with the plaintiff to that effect: *Strange & Co.* v. *Lowitz* (1); *Nicholson* v. *Mansfield & Co.* (2); Schwabe and Branson's Law of the Stock Exchange, pp. 61, 135.

[NEVILLE J. referred to *Baring* v. *Stanton*. (3)]

That case stands alone, and, moreover, there the plaintiff knew, or ought to have known, of the alleged commission. Here knowledge of the meaning to be attributed to the "net" rate cannot be imputed to the plaintiff. The case most like the present is *Johnson* v. *Kearley*. (4) The price which the continuation accounts represented that the brokers had paid the jobber was more than they actually paid, and they thus made a secret profit. They must account for that secret profit and are not entitled to any remuneration for carrying over the shares: *Salomons* v. *Pender* (5); *Andrews* v. *Ramsay & Co.* (6) It is not a case like *Hippisley* v. *Knee Brothers* (7) and *Nitedals Taendstikfabrik* v. *Bruster* (8), where the transactions were severable.

(1) (1898) 14 Times L. R. 468.
(2) (1901) 17 Times L. R. 259.
(3) (1876) 3 Ch. D. 502.
(4) [1908] 2 K. B. 82, 514.
(5) 3 H. & C. 639.
(6) [1903] 2 K. B. 635.
(7) [1905] 1 K. B. 1.
(8) [1906] 2 Ch. 671.

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Next, as to the wrongful conversion of the gas shares, the deposit of the shares was an equitable mortgage, and the defendants could not validly exercise their implied power of sale until they had given the plaintiff a proper notice requiring payment of the amount due and fixing a day certain for payment: *Deverges* v. *Sandeman, Clark & Co.* (1); and a demand for an excessive sum is bad: *Pigot* v. *Cubley.* (2) Here they never gave a notice requiring payment of the 69*l.* 10*s.*, but, if the letters relied on were a sufficient notice, the demand was excessive, because the actual amount due (if we are right on the first point) was 69*l.* 10*s.* less the 17*l.* 17*s.* 10*d.* The plaintiff therefore is entitled to damages which are not limited to the value of the shares at the date of the sale: *Greening* v. *Wilkinson* (3); *Michael* v. *Hart & Co.* (4) Further, whether a power of sale is exercised reasonably depends on the circumstances of each case: *Kennedy* v. *De Trafford.* (5) Here the defendants acted recklessly and without regard to the plaintiff's interests. Shares are separable, and they ought to have completed the transfer to themselves and then sold only enough to satisfy their debt, but they sold the whole block without considering the plaintiff at all.

Jenkins, K.C., and *J. F. Galbraith*, for the defendants. This is not a case of secret profit. The first continuation account received by the plaintiff contains a charge of "$8\frac{1}{2}$*d.* net," which the plaintiff says was not usual. There is no evidence that that charge meant only the contango. On the contrary, to every one conversant with the Stock Exchange it represented the contango plus a small charge for the broker's remuneration. The plaintiff has dabbled on the Stock Exchange before and must be taken to have some knowledge of the customs and practice of its members, and if he saw anything unusual on the contract note he would be put on inquiry, and the observations of Farwell L.J. in *Johnson* v. *Kearley* (6) are in our favour. It is not suggested that the defendants were dishonest, but only that the plaintiff did not know what profit they were making. The case falls

(1) [1902] 1 Ch. 579.
(2) (1864) 15 C. B. (N.S.) 701.
(3) (1825) 1 C. & P. 625.
(4) [1901] 2 K. B. 867; on appeal, [1902] 1 K. B. 482.
(5) [1897] A. C. 180.
(6) [1908] 2 K. B. 514, 532.

within the rule that a party contracting with a member of the Stock Exchange must be taken to know that he is dealing subject to the usual terms, i.e., a reasonable commission, and cannot afterwards complain: *Baring* v. *Stanton*. (1) Here the net rate charged was reasonable. It was only 17*l*. 17*s*. 10*d*., which is less than a commission of ½ per cent. The case is really on all fours with *Hippisley* v. *Knee Brothers*. (2) The defendants did not divide the contango with the jobber, but made an honest bargain with him. *Andrews* v. *Ramsay & Co*. (3) and *Salomons* v. *Pender* (4) are cases of fraud.

[NEVILLE J. referred to *Williamson* v. *Barbour*. (5)]

That was also a case of fraud. This is a case of honest mistake. The defendants thought the plaintiff would know the meaning of the net rate. They offer to pay the 17*l*. 17*s*. 10*d*., but submit that, on their counterclaim, they are entitled to reasonable remuneration for carrying over the shares. Then as to the alleged wrongful conversion of the gas shares——

[NEVILLE J. I do not require to hear you upon that.]

E. Lunge, in reply, on the question of wrongful conversion, referred to *Massey* v. *Sladen*. (6)

NEVILLE J. In this case the arrangement with the brokers was that the brokers should purchase certain specified shares for the plaintiff, and it was understood that the shares would not be taken up, but that when the settling day arrived they would be carried over. No cover was given at the time the transaction commenced, and it appears to me that the obligation between the parties was this, that the plaintiff was bound to put the brokers in funds as each settling day approached in order that the transaction might be got through. In my opinion no special agreement was made with regard to the brokers' remuneration. Now the settling day arrived, and the shares were duly carried over, and, taking the account of the first carrying over sent on December 13, 1904, by the brokers to the plaintiff, it is in this form. It is addressed to the plaintiff: "Dear Sir,—We beg to advise

(1) 3 Ch. D. 502.
(2) [1905] 1 K. B. 1.
(3) [1903] 2 K. B. 635.
(4) 3 H. & C. 639.
(5) (1877) 9 Ch. D. 529.
(6) (1868) L. R. 4 Ex. 13, 19.

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continuation of your account of the under-mentioned stocks, subject to the rules of the London Stock Exchange." Then there is the notice on one side, "Bought for settlement 30th inst.," and on the other side "Sold for 15th inst.," and then appears the number and description of the shares with the price and amount of the shares purchased and the price and amount of the shares sold. Looking at the price of the shares bought, there appears an entry, beyond the making up price, of "8½*d.* net," and in the other case it is "8*d.*"—that means "8*d.* net" again. Now to me it is clear that that entry purports to represent the contango, that is, what is paid, or to be paid, to the jobber for carrying over the shares. But it is known to members of the Stock Exchange that when you see 8½*d.*, or a calculation in pence, followed by the word "net," that means that in the contango is wrapped up a charge made by the broker to his customer in respect of his services for arranging the carrying over of the shares. Of course, a person well knowing with what he is being charged could not afterwards complain, and I have no doubt there are some people —customers I mean, not members of the Stock Exchange—who do know what they are to understand by seeing "8½*d.* net" in such a transaction as this. But I am also clear that there are a very much larger number of people who know nothing of the kind; and I am satisfied from the evidence of the plaintiff in this case that when he saw the "8½*d.* net" he did not know what it meant. He says his attention was not particularly called to it, and if it had been he would not have known from it that it included the brokers' charge. Upon the evidence it appears that it is an arbitrary charge, that is to say, that to the amount agreed to be paid to the jobber is added an amount, at the discretion of the broker, which he adds to the contango proper with the word "net" to indicate that he has done so. In my opinion, the word "net" in this connection, would convey nothing of the kind to the mind of any ordinary member of the public; and, as I said before, I do not think it conveyed any such information to the mind of the plaintiff. But it is said that, at all events, it was a charge in a form which ought to have put the principal on inquiry, and that, if he had made inquiry, he would not have had any difficulty in

finding out what was intended by the "8½*d.* net." In my opinion, it is not enough to put a principal on inquiry. If authority is wanted, the case of *Dunne* v. *English* (1) is explicit to that effect. In my opinion, an agent is not entitled to make a secret charge against his principal any more than he is entitled to make a secret profit which he does not disclose in his accounts. It appears to me the two things stand on precisely the same footing; and when I look at this account I can come to no other conclusion but that concealed in the amount 454*l.* 17*s.* 11*d.* is a charge which the brokers made for their services in the carrying over. I do not think in the present case that the accounts were rendered, in the form in which they were rendered, with any dishonest purpose; but that is immaterial. I do not think that it was intended specifically to mislead, and it is quite possible that the brokers might have supposed the client would know. But in my opinion it is a dishonest system, because it conceals from the principal the amount which the agent is charging. It may not be primarily intended to cover exorbitant charges, but that it is intended to conceal from the principal what the charge is, and that it is being made, is, I think, quite clear; otherwise why is it adopted? All these devices which one comes across again and again in dealings between principal and agent have one object, and one object only, and that is to conceal from the principal what the agent is doing. There are many reasons why it may suit the purposes of the broker to avoid being explicit, but the rule of the Court is without exception that secret charges cannot be made by an agent to his principal, and, in my opinion, without regard to the question whether the charges are reasonable or not. It is said, "It does not matter in the present case, because, even if you hold the charge to be concealed, it was less than what might reasonably have been made, and consequently the agent will not benefit by the transaction." But I think that the agents cannot take up that position. In my opinion the principle of *Salomons* v. *Pender* (2) and *Andrews* v. *Ramsay & Co.* (3) applies, and not that of *Hippisley* v.

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(1) (1874) L. R. 18 Eq. 524. (2) 3 H. & C. 639.
(3) [1903] 2 K. B. 635.

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Knee Brothers (1), for this reason. The concealed remuneration obtained by the agents in the present case is in the precise matter in which they were instructed to act as agents for their principal. Consequently it cannot be said, as in *Hippisley* v. *Knee Brothers* (1), that what they did was something which was collateral to, and not directly within, their duty as agents. That determines this matter so far as the question of commission is concerned.

Another question arises under these circumstances. As I said before, the original bargain between the brokers and their principal was a cash bargain in the sense that the brokers were under no obligation to make advances to or to finance their principal in any way, and for some time the account went on on that footing. But ultimately, there being a balance due in October, 1905, from the plaintiff to the defendants, which was not paid, they began to press for payment, and it was arranged that security should be given for the balance of the account. The security took the form of the deposit of the certificate of 390 shares in the Incandescent Heat Syndicate, Limited, accompanied by what is known as a blank transfer, in which the number and name of the shares were inserted, and which was signed by the transferor, but in which the name of the transferee was left blank in order that it might be filled in with the name of the purchaser, in case it should be necessary for the brokers to realize their security in order to put themselves in funds. It appears from the authorities that the power of sale which the mortgagee has under these circumstances cannot be exercised, in the first place, without notice to the mortgagor; and, secondly, that the notice must be a reasonable notice. Now I think that what is or is not a reasonable notice is not a question of law, but a question of fact, and that any attempt to lay down general rules on the subject is mischievous. If I am right in assuming that it is a question of fact, it must depend on the particular circumstances of each case, and what the judge in each case has to consider is whether the mortgagor was given a reasonable opportunity of redeeming his security before the sale was made by the mortgagee. In this case, as I read the letters, notice was given over and over again that unless payment was made the security would be

(1) [1905] 1 K. B. 1.

realized. Unfortunately, for some reason or other, Mr. Stubbs was not able to put his hand on the money at the time, so he wrote promising payment—a promise which he was never able to fulfil. One thing I should have said with regard to this cover. It is quite obvious that the security was not accepted on the footing that on the faith of it the brokers would in future finance the principal, because no sooner had the security been given than King wrote demanding payment and continued to insist on payment. Weeks rolled by, and, for some reason or other, payment was not made, and the position of the brokers was this : they had a present debt due to themselves from the principal, and, in addition to that, they had an accruing liability as each settling day came round, in respect of which they were entitled to be put in funds by their principal. That being so, it seems to me they had the right to resort to their security, both for the amount due and also in respect of the increased liability which would accrue when the settling days came round and the stocks had to be carried over again. Under those circumstances I think ample notice was given to the plaintiff that unless he redeemed the security would be realized. Indeed, having regard to what the bargain was between the parties, I think great forbearance was shewn by the brokers in realizing their security.

One other question arises. It is said that, even supposing they were entitled to realize the security, they ought to have realized only such part of the shares as was sufficient to cover the liability accrued and accruing at that particular date. It seems to me that the form and nature of the security preclude an argument of that kind. The execution of the transfer in blank of the whole block of shares by the plaintiff appears to me to indicate the intention that the power of sale was to be over the whole block if a sale was necessary, and therefore I do not think that the plaintiff could insist upon what is suggested ought to have been done, that is, a transfer in the first instance of the whole block of shares to the mortgagees, and then a sale and transfer of so many of the shares as were necessary to satisfy the mortgage. It is to be remembered that there was no market for these shares at all, and that an offer was got for 300 shares, which were supposed to be the whole block, but on reference to

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the blank transfer it turned out that 390 and not 300 was the correct number, and thereupon the brokers asked the purchaser if he was prepared to take the whole at a proportionate price, and he said he was, and thereupon the whole block was sold and transferred to him. As the matter stood, nothing else could be transferred, because all that the mortgagees had got was the transfer in blank of 390 shares from the mortgagor. It appears to me they were not acting in excess of their rights, and I am quite certain they had no collateral purpose, but merely sold in order to put themselves in funds to pay this debt. It seems to me, therefore, that the claim with regard to the realization of the security fails, and that the proper order to make as to the costs will be this: to give the plaintiff the costs of the action except so far as they are increased by the claim in respect of the realization of the security, and to give the defendants the costs of the claim in respect of the realization of the security, with the usual set-off. Then the plaintiff is entitled to an account, but if he likes to take an order for payment of the 17*l.* 17*s.* 10*d.* offered by the defendants he can do so. I do not include the opening commission of 1*s.* a share. If the plaintiff insists on the account he must have it, and I shall reserve the costs of it.

Solicitors: *Weekes & Co.; H. S. Holt.*

H. L. F.

In re DISCOVERERS FINANCE CORPORATION, LIMITED. LINDLAR'S CASE.

NEVILLE J.
1909
Nov. 9, 16.

[00199 of 1906.]

Company—Winding-up—Contributory—Transfer of Shares to escape Liability—Validity—Test—Transfer out and out—Bona fides—Equities between Transferor and Transferee.

A transfer of shares not fully paid to a man of straw made for the purpose of escaping liability may be valid if made "bona fide" in the sense that the transfer is made out and out, without any obligation or undertaking on the part of the transferor to indemnify the transferee.

The fact that the directors had power to refuse registration of the transfer and neglected their duty in not doing so will not invalidate the transfer, unless registration was obtained by collusion or misrepresentation. The representation that a consideration, on the face of it purely nominal, has been paid, when in fact it has not, does not amount to such misrepresentation.

Semble, a liquidator in a winding-up is not entitled to have a transfer set aside on the ground that the transferee had as against the transferor an equitable right to set aside the contract.

THIS summons was taken out by the liquidator of the Discoverers Finance Corporation, Limited, to rectify the list of contributories by substituting the name of Max Lindlar for that of Otto Schneider in respect of 2000 ordinary shares of 1*l.* each on which only 7*s.* 6*d.* per share had been paid. The company was incorporated on June 10, 1896, for the purpose of carrying on all kinds of mining and finance business. Max Lindlar had subscribed for 2000 shares and paid up 7*s.* 6*d.* per share. He was resident, and engaged in business, in London. From the beginning of the year 1900 onwards the company did no business, except that it was interested jointly with the Universal Corporation, Limited, in some mining or prospecting operations carried on by that company in Canada on the joint account at a loss.

In 1904 Max Lindlar, owing to something he heard from persons interested in the company, became very anxious to get rid of the liability on his shares. He tried to find a purchaser in England, but failed. He then applied to his brother-in-law,

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Otto Dahl, who was carrying on business at Barmen, in Germany, to find him a purchaser, saying he would sell the shares for 5*l.* Otto Dahl, with the assistance of his brother, Hugo Dahl, brought the matter before Otto Schneider, a journeyman tanner, who had been forty years in the employment of Otto Dahl, or his father, at the average salary of 40 marks a week, and he agreed to purchase the shares for 100 marks. Otto Dahl informed Lindlar of this, and, as the judge held, Lindlar filled up a transfer in the usual form to Otto Schneider, who was described merely as "of Barmen, Germany," the consideration being 5*l.* This transfer was sent out to Germany, duly executed by Otto Schneider, and returned to Max Lindlar, who sent it in for registration and paid the registration fee and stamp. The directors had an absolute power to refuse to register transfers. The transfer was passed without opposition at a board meeting held on February 3, 1905, together with several others, one of which was set aside as fraudulent by Parker J. in *In re Discoverers Finance Corporation.* (1) The company went into voluntary liquidation on March 16, 1906.

Max Lindlar had been examined before the liquidator, and he and the directors and secretary of the company were cross-examined at the hearing of the summons, and the Messrs. Dahl and Otto Schneider had been examined by commission in Germany. The purchase-money of 5*l.* (100 marks) was never paid or asked for. The explanation given for this was that Otto Schneider had shortly after the transaction met with a serious accident and been crippled for life.

The judge held, upon the evidence, that the transfer to Schneider was an out and out transfer, without any undertaking or arrangement that Schneider should be indemnified against loss by the Dahls or by Lindlar, and that the registration of the transfer was not obtained collusively by Lindlar or by misrepresentation.

Younger, K.C., and *Maugham*, for the liquidator. The case is exactly similar to Cooper's case in the same company: *In re Discoverers Finance Corporation.* (1) Parker J. decided that case on the ground that the transfer was not bona fide. Here

(1) [1908] 1 Ch. 141.

there is even clearer evidence that the sale was not genuine. Considering the position of the parties, it is impossible to suppose that the Messrs. Dahl would have allowed Schneider to suffer; there must have been an intention that either they or Mr. Lindlar should keep him indemnified. No money was paid by Schneider, and it is plain that Otto Dahl told Lindlar that he would get Schneider to take the shares before he had communicated with Schneider at all. It was altogether a bogus transaction. Schneider did what he was told without knowing anything about the position in which he was placing himself. *De Pass's Case* (1), where the transfer was upheld, is distinguishable. In that case there was an actual sale, the price was paid, and the transferee had sold the shares again before the winding-up. *Costello's Case* (2) decided that the onus was on the transferor to shew that the transfer was bona fide, and this case is stronger, for there the money was paid. *Lund's Case* (3) is in our favour.

[NEVILLE J. If the statement of the law in that case is correct, no transfer for the purpose of escaping liability could ever stand.]

This transfer was also void on the ground that the registration was obtained by misrepresentation to the directors. In *Ex parte Kintrea* (4) the fact that the consideration money was not paid was held to be proof of misrepresentation. [They also referred to *Payne's Case* (5), *Williams' Case* (6), and *Slater's Case.* (7)]

The description of Schneider as of Barmen, Germany, is in itself a misrepresentation, implying that he was a man of business to whom that address was sufficient. The evidence shews that the transfers were passed only because Gretton, the chairman, who was a friend of Lindlar's, said they were all right.

Rawlins, K.C., and *Douglas Hogg*, for Lindlar, were not called upon.

NEVILLE J. In this case Mr. Lindlar, the respondent to the present application, was the holder of 2000 1*l.* shares in the

(1) (1859) 4 De G. & J. 544, 558.
(2) (1860) 2 D. F. & J. 302.
(3) (1859) 27 Beav. 465.
(4) (1869) L. R. 5 Ch. 95.
(5) (1869) L. R. 9 Eq. 223.
(6) (1869) L. R. 9 Eq. 225, n.
(7) (1866) 35 Beav. 391.

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Discoverers Finance Corporation, Limited, in respect of which he had paid some 750*l*. From the year 1900, although there is very little evidence on this point, the company appears to have been in the position of sleeping partner in the working or proving of certain mining lands in America. The meetings of the board of directors were few and far between. The liability upon these shares was, of course, heavy, and Mr. Lindlar, owing, as he says, to something that was told him by persons connected with the company, became alarmed at the contingent liability to which he was exposed, and determined to do his best to get rid of his shares for the purpose of escaping the liability for the amount unpaid on them. There was no market for the shares, and his efforts in this country to get anybody to take a transfer of the shares failed. But he had a brother-in-law, Otto Dahl, in Germany, and Otto and his brother Hugo undertook to get or told Lindlar that they could get him a transferee of the shares at the price of 100 marks. What they did do was to go to one Schneider, an employee of Otto, a man who was in receipt of some 40 marks a week, and to put the matter before him, and he undertook to take the risk and agreed to the shares being transferred to him at the price of 100 marks. The transfer was thereupon—I am not quite sure whether their recollection can be trusted as to when the transfer was filled in, but according to the evidence a transfer was thereupon—filled in by Lindlar on the information given to him and sent out to Barmen for execution, and was there duly executed by Schneider. The 100 marks were never paid, Otto Dahl saying that owing to an accident that happened shortly afterwards Schneider was crippled for life, and he never applied to him for the money. I am clear that the question of the receipt of the consideration was in Lindlar's view one of little or no importance. He paid both the half-a-crown necessary for registering the transfer of the shares and the 10*s*. stamp upon the transfer, and there is no question that what was in his mind and what the transaction was intended for on his part was to get rid of his liability on the shares. On the other hand, I think that the transaction effected the transfer of the shares out and out to Schneider, and I cannot find upon the evidence that there was any undertaking

or obligation on any of the parties concerned to indemnify Schneider in case the worst came to the worst and he suffered injury from the fact of having executed the transfer. The argument on that head was put in this way—that honourable men, dealing with Schneider as the Dahls did deal with him, having regard to their mutual position, could not be supposed to have done so without an intention, either expressed or tacit, that they would not allow any injury to fall upon him as the result of his doing what they led him to do. If the argument is analysed I think it amounts to this, that men must be taken to be honourable men of high principle until the contrary is proved. There is no proof to the contrary with regard to the Messrs. Dahl, and, therefore, what it is suggested ought to have been in the mind of a really high-principled person must be taken to have been in their minds, and, therefore, it must be inferred that there really was an undertaking or an engagement to protect Schneider from the result of his action. I think that in Courts of law inferences must be based upon some more substantial ground than that, and I cannot find that there was anything but, as I said before, a transfer out and out, without obligations expressed or implied upon anybody to indemnify or protect Schneider in respect of the transaction. I think upon the evidence it would be impossible for me, supposing the matter had to be decided in this Court and upon the evidence at present before it, to decide that Schneider had any ground for repudiating the transaction as between himself and Lindlar.

Then with regard to the board. The transfers were duly lodged and were passed by the board of directors. The responsibility of passing them is tossed from side to side by those who ought to have been responsible for the transaction, and whether all of them, or any of them, were guilty of neglect of their duty to the company by passing those transfers I do not think it is for me to say, but what I have to consider is whether what was done was done collusively between Lindlar and the board. I cannot find any evidence on which I can come to the conclusion that there was collusion in the passing of the transfers.

That brings me to another point. Schneider is described

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simply as of "Barmen, Germany," and I think the directors might very well have declined to pass a transfer with such an inadequate description. But it is said, not that the description is inadequate, and therefore ought to have put the directors upon inquiry, but that the transfer contained a misrepresentation, the misrepresentation alleged being that inasmuch as Barmen was the sole address given it amounts to a representation that Schneider was of such a social position that a letter addressed to "Schneider, Barmen," would necessarily be delivered to the transferee. I cannot think that, inadequate as the description was, it could be treated as a representation that Schneider was a man of substance or a man of position.

With regard to the consideration. Upon the face of this transfer the consideration for 2000 shares of 1*l.* each, in respect of which 750*l.* had been paid, was 5*l.* To my mind that is obviously a nominal consideration, and it is of importance that the document on the face of it is a transfer for a nominal consideration and not for a market price.

Those being the facts as I find them upon the evidence, the question is what is the legal result? First of all I should like to refer to what Turner L.J. said in *De Pass's Case*. (1) He says: "It sufficiently appears, I think, from the evidence, that at this time they were aware, or at all events had good reason to suspect, that the company was in difficulties. It was, indeed, admitted in the reply that their object was to get rid of their liability, and it was insisted that they were entitled to do so. I agree that they were, for I cannot see what equity there could be on the part of the other shareholders to insist upon their retaining the shares. The question, therefore, as to these appellants seems to be, whether they did or did not on the 8th of November, 1857, bona fide part with these shares out and out." It appears from the decision of Parker J. (2), with which I agree, that the question which has to be determined under circumstances similar to these is whether the transfer was bona fide. But I think that the judgment of Turner L.J. which I have read gives the true explanation of the words "bona fide"

(1) 4 De G. & J. 558.

(2) *In re Discoverers Finance Corporation*, [1908] 1 Ch. 141.

in this connection. I think that this was a transfer out and out, and if it was, it appears to me that it is bona fide for the purposes of the decision of the present case. There is one other point which I think I ought to deal with, as it has been referred to, although upon the facts as I find them I do not think it actually arises in the present case. It is this: it is said that the result of the cases is that, where a transferee has an equitable right to set aside the transaction with his transferor, and a liquidation follows, the liquidator is entitled to take advantage of the transferee's right and has the same locus standi before the Court for that purpose as the transferee himself. I am perhaps rather amplifying what was said, but that is what it seems to me the argument amounts to. I think pushed to its proper conclusion it must mean that, or nothing at all of importance. In that regard I should like to refer to what is said by Lord Romilly in *Slater's Case* (1), with which I respectfully say I entirely concur. He says: "If a person holding shares in a joint stock company induces another person to buy them by making false representations to that person, the purchaser may come here to set aside the transaction as between them. But the company have nothing to do with that matter, and, subject to any power which they may possess of rejecting any transfers, they must adopt the decisions of the Courts as to the person who is to become or to remain a shareholder. The Court in such matters cannot look into the question of the fairness of the means by which such transfer was effected. If A. says to his servant, the company is about to be wound up, take my shares, they can get nothing from you, and will not attempt it, and I will repay you for the trouble and loss you may sustain, the company may properly say, this is no transfer, and that A. is still liable. But if A., knowing that a company is on the eve of bankruptcy, says to B., 'this is a thriving and valuable company,' and thereby induces B. to buy them, B., as regards the company, is the shareholder, until by a decree of the Court he has set aside the transaction and compelled A. to take back his shares." Then later on he says: "I assume that, if Casson pleased, he might, by bill in equity,

(1) 35 Beav. 393.

NEVILLE J. 1909 DISCOVERERS FINANCE CORPORATION, LIMITED, *In re.* LINDLAR'S CASE.

set aside the transfer, and compel Slater to take back the shares; but until he has done so he is the shareholder, and to such a suit the company would not be proper parties." That seems to me to lay down the law correctly, and with regard to the equity which has been suggested it must be remembered that the rights between the liquidator and the members of the company and between past and present members are statutory rights, which can neither be straitened nor enlarged by the decisions of the Courts. Further, it must be remembered that in the case supposed the contract is not void between the transferor and the transferee, but is voidable only, and it seems to me that to apply the doctrine of subrogation so as to put the liquidator in the same position as the transferee would be to do what, as I understand the cases, has never been done, and would be in effect to put the liquidator in a position in which he is not placed by the statute which creates his office. I think, therefore, that in this case the claim to put Mr. Lindlar on the register fails.

[No order was made as to costs.]

Solicitors: *Dunderdale, Dehn & Co.; Clarke, Rawlins & Co.*

J. R. B.

JOYCE J.
1909
Dec. 2, 3.

In re BURLEY.
ALEXANDER *v.* BURLEY.

[1909 B. 2778.]

Will—Construction — Absolute Gift — Codicil directing Use of Legacy for Charitable Purposes—Precatory Trust—"I wish."

A testatrix by her will gave to R. a legacy of 2300*l.* By a codicil dated the same day as the will she declared as follows: "I wish R. to use 1000*l.*, part of the legacy given to him by my above will, for the endowment in his own name of a cot in the I. hospital, and to retain the balance of the said legacy for his own use and benefit." By a second codicil in 1905 she declared: "I wish R., after endowing a cot as provided by the first codicil, to use the balance of the legacy given to him by my will for such charitable purposes as he shall in his absolute discretion think fit." R. disclaimed the legacy:—

Held, that a trust was created for the charitable purposes mentioned in the codicils.

Adjourned Summons.

Mary Jackson Burley by her will, dated November 3, 1903, gave to Lieutenant-Colonel Russell a legacy of 2300*l.*, and she declared that if he should die in her lifetime leaving issue then she gave the legacy to his children or child who should survive her. By a codicil dated the same day as the will she declared as follows: "I wish Colonel Russell to use 1000*l.*, part of the legacy given to him by my above will, for the endowment in his own name of a cot in the Ipswich and East Suffolk Hospital, and to retain the balance of the said legacy for his own use and benefit."

By a second codicil dated September 29, 1905, she declared: "I wish Colonel Russell, after endowing a cot as provided by the first codicil, to use the balance of the legacy given to him by my will for such charitable purposes as he shall in his absolute discretion think fit."

By a deed poll dated July 13, 1909, Lieutenant-Colonel Russell wholly and absolutely renounced and disclaimed the said legacy of 2300*l.* given to him by the above-mentioned will.

The testatrix died in 1909.

JOYCE J.
1909
BURLEY, *In re.* ALEXANDER *v.* BURLEY.

This was a summons taken out by the trustees of the will raising the question (inter alia) whether the said codicils or either of them created any and what trusts or trust of the legacy of 2300*l.* by the said will bequeathed to Lieutenant-Colonel Russell, or of any and what part of the said legacy.

Crossman, for the trustees.

Younger, K.C., and *Ashworth James*, for the residuary legatees. Lieutenant-Colonel Russell having disclaimed the legacy, it fails and falls into residue. The codicils constitute merely a precatory wish, not binding upon the legatee. He might have retained the whole of the legacy for his own use. The testatrix has merely expressed a wish and used no such words of command as will impose a trust.

No doubt before the recent authorities the words used by the testatrix might have been held sufficient to create a trust: *In re Hamilton* (1); *In re Williams* (2); *Comiskey* v. *Bowring-Hanbury.* (3) According to those cases the Courts are not so fettered by the older authorities as they might otherwise have been. They will now be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed.

Under the will itself the legacy went to Colonel Russell's issue in the event of his predeceasing the testatrix. If he had so predeceased her it could not have been said that the codicils imposed a charitable trust upon his issue.

This is a very exceptional trust, if it be one, for it comes to an end with the death of the trustee.

Sargant, for the Attorney-General. Apart from recent decisions these codicils would clearly have created a precatory trust. No doubt the law is correctly laid down in *In re Williams* (2), but I rely upon the expressions of Lindley L.J. in that case where he said (4): "The term 'precatory' only has reference to forms of expression. Not only in wills but in daily life an expression may be imperative in its real meaning although couched in language which is not imperative in form. A request

(1) [1895] 2 Ch. 370.
(2) [1897] 2 Ch. 12.
(3) [1905] A. C. 84.
(4) [1897] 2 Ch. 19.

is often a polite form of command." And Rigby L.J., quoting Lord Langdale in *Knight* v. *Knight* (1), says (2): "The recommendation, entreaty, or wish shall be held to create a trust, first, if the words are so used, that upon the whole, they ought to be construed as imperative." These codicils contain complete simple directions as to what is to be done with the legacy. They are executed solely for that purpose, and if they do not constitute a trust it is difficult to see how in any case a precatory trust could be established.

Younger, K.C., in reply.

JOYCE J. I may be wrong, but, in my opinion, if this case had been tried twelve or fifteen years ago it would have been unarguable; that is to say, it would not have been possible to argue with any effect that a trust for charitable purposes, for the charitable purposes named, was not created by the instruments in question in this case. But there are recent cases which have thrown doubt upon the old rule or upon the extent of it. This is not like the case of *Comiskey* v. *Bowring-Hanbury* (3), in which there were in the same instrument expressions apparently inconsistent, which created an ambiguity compelling the Court to guess almost what upon the whole was the true result of the document and what was the meaning of the testator. Here, there being a will leaving a legacy to Lieutenant-Colonel Russell, we have a later instrument, a separate instrument, a codicil, executed for the purpose, and for the only purpose, of making provision or giving a direction with reference to that particular bequest, presumably to alter that which had been done by the will. The documents that I have to consider are two codicils, the first codicil with reference to the 1000*l.*, one part of the legacy, and the other codicil with respect to the 1300*l.*, the residue. [His Lordship then read the codicils, and continued:—]

Now it is said that the result of the recent cases is to have established the reasonable rule that the Court is to consider in each particular case what was the testator's intention. As Romer J. said in *In re Williams* (4), quoting from the head-note

(1) (1840) 3 Beav. 172.
(2) [1897] 2 Ch. 29.
(3) [1905] A. C. 84.
(4) [1897] 2 Ch. 14.

JOYCE J. 1909 BURLEY, *In re.* ALEXANDER *v.* BURLEY.

in *In re Hamilton* (1), "In considering whether a precatory trust is attached to any legacy, the Court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed." I may be wrong, but the conclusion at which I have arrived is this—that by the first codicil the testatrix intended that 1000*l.*, part of the 2300*l.* legacy mentioned in the will, should be applied in endowing a cot in the hospital named, and she intended that to be done without Lieutenant-Colonel Russell having any choice as to whether it should be done or not. So also I think that on the whole her intention, which I infer or gather from the second codicil, was that the 1300*l.*, the balance of the legacy, should be given, employed, or expended in charitable purposes without Lieutenant-Colonel Russell having any choice as to whether that should be done or not, although he was to have a discretion as to the charitable purposes to which it was to be devoted. This in my opinion is clear according to the rule laid down in the old cases, and I do not think that in cases such as this the rule has been altered by the recent decisions. That being my view, I must decide according to the old rule, and it is for the Court of Appeal and not for me to alter that rule with reference to such a case as this.

There will be a declaration that according to the true construction of this will and codicils the legacy of 2300*l.* is given for the charitable purposes mentioned in the codicils, and, if necessary, there must be a scheme.

Solicitors: *Clements, Williams & Co., for Birkett, Ridley & Francis, Ipswich: Solicitor to the Treasury.*

(1) [1895] 2 Ch. 370.

G. A. S.

JOYCE J.
1909
Dec. 15.

In re CONOLLY.
CONOLLY *v.* CONOLLY.

[1909 C. 2102.]

Will—Construction—Absolute Gift—Gift on Condition—Precatory Trust for Charity—"I specially desire."

Testator gave to his brother W. his share in a leasehold house "and to my sisters A. and L. equally the rest of my stocks and shares, subject to a legacy, duty free, provided by the above three legatees of 1000*l.* to my cousin E. R. C., the said E. R. C. to be, with my brother W., my co-executor and trustee for my sisters A. and L." Then, after making a further specific bequest, the will concluded as follows: "I specially desire that the sums herewith bequeathed shall, with the exception of the 1000*l.* to E. R. C., be specifically left by the legatees to such charitable institutions of a distinct and undoubted Protestant nature as my sisters may select, and in such proportions as they may determine":—

Held, that the sisters took their legacies absolutely.

Adjourned Summons.

The testator Arthur Conolly by his will, dated in 1898, gave to his brother William his share in a leasehold house, "and to my sisters, Anne and Louisa, equally the rest of my stocks and shares, subject to a legacy, duty free, provided by the above three legatees of 1000*l.* to my cousin E. R. Conolly, the said E. R. Conolly to be, with my brother William, my co-executor and co-trustee for my sisters Anne and Louisa." Then, after making a further specific bequest, the will concluded as follows: "I specially desire that the sums herewith bequeathed shall, with the exception of the 1000*l.* to Colonel E. R. Conolly, be specifically left by the legatees to such charitable institutions of a distinct and undoubted Protestant nature as my sisters may select, and in such proportions as they may determine."

The testator died on May 21, 1909, and letters of administration with the will annexed were granted to William Conolly.

This was an originating summons taken out by the administrator raising the question (inter alia) "whether the property bequeathed to or in trust for the testator's sisters belonged to them absolutely, or whether a valid or binding charitable trust

JOYCE J. 1909 CONOLLY, *In re.* CONOLLY *v.* CONOLLY.

was by the will created of such property after their respective deaths or the death of the survivor of them."

Church, for the plaintiff.

Sargant, for the Attorney-General. This is a good precatory trust for charity. Previous to the recent authorities, beginning with *In re Hamilton* (1), there would have been no doubt about this will creating a trust for charity.

[JOYCE J. In the case which I decided the other day, *In re Burley* (2), there were separate testamentary instruments.]

Under the older authorities, where the property to be subject to and the objects to be benefited by the trust were sufficiently certain, a trust was implied from words of request and entreaty, such as "desire," "dying request," "wish and request," "wish and desire," &c.: see *Harding* v. *Glyn* (3); *Pierson* v. *Garnet* (4); *Foley* v. *Parry* (5); *Liddard* v. *Liddard*. (6)

The cases of *In re Hamilton* (1), *In re Williams* (7), and *In re Oldfield* (8) are supposed to have considerably narrowed the implication of precatory trusts from particular words of desire or request. The Court has to consider whether words which in form are polite and not imperative are really in effect imperative, or whether precatory words used by the testator are intended by him to be equivalent to a command. Here if no trust were intended the appointment of trustees for the two sisters would be unintelligible, because the gift to the sisters in the first place is absolute. The words "especially desire" very nearly approach "I will"; moreover, the property is to be specifically left by the legatees to charity, the objects being carefully pointed out. Although the word "trust" is not used, there is something imperative, something equivalent to a polite command.

In *Comiskey* v. *Bowring-Hanbury* (9) Lord Halsbury L.C. laid stress upon the fact that in that case it was the intention of the testator that the property should remain intact until the

(1) [1895] 2 Ch. 370.
(2) Ante, p. 215.
(3) (1739) 1 Atk. 469.
(4) (1786-7) 2 Bro. C. C. 38, 226.
(5) (1833) 2 My. & K. 138.
(6) (1860) 28 Beav. 266.
(7) [1897] 2 Ch. 12.
(8) [1904] 1 Ch. 549.
(9) [1905] A. C. 84.

death of his widow, and that at her death she should devise the same property.

[JOYCE J. Then there was a positive direction.]

Unless there be a trust in this case, then no trust can be created without the use of the word "trust" or such expressions as "I will" or "I direct." It is submitted that words of polite request may still amount to a declaration of trust.

Hughes, K.C., and *Gutch*, for the testator's sister Louisa and for the representatives of Anne, who had died since the testator were not called upon.

JOYCE J. In this case it is contended that the concluding clause in the will cuts down the gift previously made to the testator's sisters to a life estate, and imposes a trust with reference to the disposition of what they take, or a proportion of what they take for their lives on their death. To my mind there are various elements of uncertainty in this case. The clause in question says "I specially desire that the sums herewith bequeathed." There are no sums, strictly speaking, bequeathed to them. "The rest of my stocks and shares, subject to a legacy," are bequeathed to them. "Sums" may mean stocks and shares, or only what they take in money. There is an element of uncertainty there. There is another element of uncertainty in this. It is to be specifically left to such charitable institutions, &c., "as my sisters" (that is the two) "may select, and in such proportions as they may determine." Possibly that ought to be read, if any effect had to be given to it, that each sister's share was to be left in such proportions as they severally should determine, that as to each sister's share it was to be dealt with as that sister should determine. There seem to be difficulties in the way of the Attorney-General making out here that there is a definite and imperative trust.

But I go beyond merely these considerations, and I think that I am bound by the authorities with reference to precatory trusts; and by the recent cases, beginning with *In re Hamilton* (1), to hold that where in a will words of gift are used, which, by themselves, are sufficient to give the legatee, devisee, or

(1) [1895] 2 Ch. 370.

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donee perhaps I should say, the whole property in the subject-matter of the gift, then the interest of that devisee or legatee will not be cut down to a trust estate, or to a life estate with a trust for disposal after the determination of the life, by the mere expression of a desire, such as "I desire that the property shall be left by the donees to some charitable purpose," or to somebody else. I think that is what follows from the authorities as they now stand.

This being so, I hold that in this case these ladies take absolutely what they do take, and that there is no definite trust created for a charity, or any one else, in what they do take. I think that that is the result of the authorities with reference to precatory trusts. I think that the rule which I have already mentioned in former cases applies here. Here the property is given to these two ladies. Can I take it away? I cannot take it away by words which are of a doubtful or uncertain meaning, and words as to the effect of which there is any serious doubt. To my mind there is very serious doubt here as to whether the property is taken away by these words, and therefore I hold that these ladies take absolutely whatever is given to them, namely, the stocks and shares belonging to the testator.

Solicitors: *Eardley Holt, Lightly & Co.; Solicitor to the Treasury.*

G. A. S.

In re DEHAYNIN (INFANTS).

C. A.
1909
Dec. 6.

[1909 D. 092.]

Practice—Vesting Order—Infant—Stock in Name of Infant and another to which Infant is entitled—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 35, *sub-s.* 1 (ii.) (*a*)—*Infants Property Act*, 1830 (11 *Geo.* 4 & 1 *Will.* 4, *c.* 65), *s.* 32—*Form of Order.*

Where stock to which an infant was beneficially entitled had been invested in the joint names of himself and another person :—

Held (reversing the decision of Joyce J.), that the Court had jurisdiction under s. 35, sub-s. 1 (ii.) (*a*), of the Trustee Act, 1893, notwithstanding some slight difference in the language of this section and sub-sections as compared with s. 3 of the Trustee Extension Act, 1852, to make an order vesting the right to transfer such stock in the infant's guardian.

Per Farwell L.J.: The words "(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—(*a*) is an infant," apply to a case where one of the trustees is an infant and the stock is held in trust for the infant.

In re Harwood, (1882) 20 Ch. D. 536, and *In re Barnett's Estate*, [1889] W. N. 216, approved.

Appeal from a decision of Joyce J.

In January, 1907, the late Charles Albert Dehaynin, a domiciled Frenchman, and the natural grandfather of two infants, a boy then aged fifteen and a girl aged thirteen, transferred a sum of 20,000*l.* Consols into the joint names of one Charles Albert Theodore Zynen and the boy, and a like sum of 20,000*l.* Consols into the joint names of the said Charles Albert Theodore Zynen and the girl, as a provision for these infants respectively, who were the natural children of a deceased son. At the date of the petition hereinafter mentioned these sums of Consols were still standing in the above-mentioned joint names.

It appeared that the said Charles Albert Theodore Zynen had in 1897, after the death of the infants' father, been appointed the dative guardian of the infants by the family council; but since that appointment the law of July 2, 1907, had come into force, under which the guardianship of children born out of wedlock was granted to the father and mother who had formally acknowledged the same as their children, and in accordance with the said law one Mary White, having formally

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acknowledged the same as her children, became the legal guardian of these infants.

There was evidence that according to the law of France the said Mary White, as the legal guardian of her infant children, was entitled to receive and give legal discharges for all moneys, stocks, and securities held by their former dative guardian, and to get any such moneys, stocks, and securities transferred from his name into her own, being since the law of July 2, 1907, came into force alone entitled to receive, hold, and administer on behalf of her infant children all property of every kind belonging to them.

A petition had now been presented, headed "In the matter of the infants" (by name) and "In the matter of the Trustee Act, 1893," in which the infants by the said M. White as their guardian and next friend and the said M. White prayed—

(1.) "That the right to transfer the two sums of 20,000*l.* Consols now standing in the joint names aforesaid and to receive the dividends which have already accrued and remain unreceived and also the dividends which may hereafter accrue on such Consols prior to the transfer thereof may vest in your petitioner Mary White."

(2.) "That your petitioner Mary White may be directed to transfer the said first mentioned sum of 20,000*l.* into the joint names of your petitioner Mary White and the said" boy, and "the said second mentioned sum of 20,000*l.* into the joint names of" the petitioner and the girl.

The petition was not served upon any one.

Joyce J. refused to make any order, considering he had no jurisdiction to do so in consequence of the difference in the language of s. 35, sub-s. (1) (ii.) (*a*), as compared with s. 3 of the Trustee Extension Act, 1852.

The petitioner appealed.

Whinney, for the appellant. A deputy guardian has been appointed by the French civil tribunal, so that this money will not be under the sole control of the petitioner, the legal guardian. The dative guardian has been superseded, and it becomes necessary now to get a transfer.

[COZENS-HARDY M.R. Why do you not bring the moneys into Court?]

The petitioner M. White is quite ready to do this if there is jurisdiction to vest the right of transfer in her, as it is submitted that there is under s. 35, sub-s. 1 (ii.) (*a*), of the Trustee Act, 1893.

Under the Infants Property Act, 1830, the Court has power, on the petition of the guardian of any infant in whose name any stock may be standing and who shall be beneficially entitled thereto, to direct all or any part of the dividends to be paid to the guardian.

Where stock to which an infant was beneficially entitled had been invested in the joint names of himself and another person, the Court made an order vesting in that other person the right to transfer such stock in *In re Harwood* (1) under s. 3 of the Trustee Extension Act, 1852. There is no substantial difference in the wording of that section and the corresponding section of the Trustee Act, 1893. *In re Harwood* (1) has been followed in *In re Barnett's Estate.* (2) It is not necessary that the infant should be a trustee for any one else in order to give jurisdiction under s. 35, sub-s. 1 (ii.) (*a*). In *Sanders* v. *Homer* (3) and in *In re Westwood* (4) an infant was held to be a "trustee" within the meaning of the Trustee Act then in force. *Gardner* v. *Cowles* (5) is also in point.

[FLETCHER MOULTON L.J. The Consols stand in the names of two persons in trust for one: surely that gets over any difficulty about the infant being a trustee.

FARWELL L.J. referred to *In re Findlay* (6), where an infant was held to be "trustee" of the stock in which she was interested.]

The Bank of England appear to have subsequently objected to that order (7), but the principle of that case applies.

In re Harwood (1) has always been considered to apply to s. 35, sub-s. 1 (ii.) (*a*), of the Trustee Act, 1893. The petitioner Mary White will give an undertaking to bring these funds into Court if the order is made.

(1) 20 Ch. D. 536.
(2) [1889] W. N. 216.
(3) (1858) 25 Beav. 467.
(4) (1865) 6 N. R. 61.
(5) (1876) 3 Ch. D. 304.
(6) (1886) 32 Ch. D. 221.
(7) (1886) 32 Ch. D. 641.

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COZENS-HARDY M.R. I think we shall be fully justified in following *In re Harwood* (1) and *In re Barnett's Estate* (2), and although there is some slight difference in the language of the Trustee Act, 1893, as compared with s. 3 of the Trustee Extension Act of 1852, I do not think it is a vital distinction. It seems to me the principle of those cases may be applied here, and we may make the vesting order or give directions to transfer, and declare that Mr. Zynen and the infants are respectively trustees within the meaning of the Trustee Act, 1893, on the lines of the order in *In re Harwood* (1), the petitioner M. White undertaking to transfer the funds into Court.

FLETCHER MOULTON L.J. I am of the same opinion. I think this case is within the words and the spirit of sub-paragraph (ii.) (*a*) of sub-s. 1 of s. 35 of the Trustee Act, 1893.

FARWELL L.J. I agree. The words in sub-s. (ii.), "Where a trustee entitled alone or jointly with another person to stock or to a chose in action—(*a*) is an infant," appear to me to apply to a case like the present, where one of the trustees is an infant and the money is held on trust for the infant. I think this case comes within the very words of the section.

COZENS-HARDY M.R. The petition should be amended by entitling it "In the matter of the Infants Property Act, 1830," and then the dividends can be ordered to be paid to the petitioner. Mr. Zynen, the dative guardian, should also be added as a petitioner.

The following are the material parts of the order as drawn up:—

And it appearing to the satisfaction of the Court that the petitioner Charles Albert Theodore Zynen is jointly entitled with the petitioner [the boy] who is an infant to the sum of 20,000*l.* Consols standing in their names in the books of the Bank of England upon a trust within the meaning of the Trustee Act 1893 and that the said [boy] is beneficially interested in the said Consols And it also appearing that the said Charles Albert Theodore Zynen is jointly entitled with the petitioner [the girl] who is an infant to the sum of 20,000*l.* Consols standing in their names in the books of the Bank

(1) 20 Ch. D. 536. (2) [1889] W. N. 216.

of England upon a trust within the meaning of the Trustee Act 1893 and that the said [girl] is beneficially interested in the said Consols This Court doth Order that the right to transfer the said sum of 20,000*l.* Consols now standing in the names of [Zynen and the boy] and the said sum of 20,000*l.* Consols now standing in the names of the said [Zynen and the girl] respectively and to receive the interest which has already accrued due and remains unreceived and also the interest which may hereafter accrue on such Consols prior to the lodgment thereof hereinafter directed vest in the petitioner Mary White And it is Ordered that the petitioner Mary White do lodge the said several sums of 20,000*l.* Consols in Court as directed in the Lodgment and Payment Schedules hereto respectively And it is Ordered that the said several sums of Consols be dealt with as directed in the said schedules the petitioner Mary White by her counsel undertaking to apply the said interest accrued due and unreceived and the interest by the said schedules respectively directed to be paid to her for the education and maintenance of the said infant petitioners.

LODGMENT AND PAYMENT SCHEDULE I.

Title

Ledger credit. The share of the [boy] an infant from 28th September, 1893.

I.—LODGMENT.

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.					
		Money.			Securities.		
		£	s.	d.	£	s.	d.
Consols.	The petitioner Mary White				20,000	0	0

II.—PAYMENT.

Funds to be dealt with. Funds to be lodged as above.

Particulars of payments, transfers, or other operations ordered.	Payees transferees or separate accounts.	Amounts.					
		Money.			Securities.		
		£	s.	d.	£	s.	d.
Pay interest as it accrues on funds to be lodged during minority of said infant [boy] or until further order.	The petitioner Mary White of [address] the guardian of the said infant.						

[Schedule II. was in similar terms, the name of the girl being substituted for the name of the boy.]

Solicitors: *Foss, Bilbrough, Plaskitt, Foss & Bryant.*

W. C. D.

C. A.
1909
JOYCE J.
Nov. 23, 24, 30.
1910
C. A.
Jan. 11.

BLYTHE *v.* BIRTLEY.

[1909 B. 2083.]

Friendly Society—Conversion into Company—Enlargement of Objects—Special Resolution—Friendly Societies Act, 1896 (59 & 60 *Vict. c.* 25), *s.* 8, *sub-s.* 1; *s.* 70, *sub-ss.* 1, 2, 3; *s.* 71, *sub-s.* 1; *s.* 74.

It is not competent for a society, registered under the Friendly Societies Act, 1896, under the guise of converting itself into a limited company pursuant to s. 71, sub-s. 1, of that Act, to turn itself into a company with objects much more extensive than and widely differing from the objects specified by the rules of the society or by s. 8, sub-s. 1, of the Act. The procedure under s. 71, sub-s. 1, is a mere matter of machinery under which a society can become a different legal entity having objects identical with the objects prescribed by its rules or by s. 8, sub-s. 1, though when converted it can exercise such powers of altering or enlarging its objects, as defined by its memorandum, as are conferred by the Companies Act on all limited companies.

Decision of Joyce J. affirmed.

Appeal from a decision of Joyce J. on the construction of s. 71, sub-s. 1, of the Friendly Societies Act, 1896, which provides that "A registered society may, by special resolution, determine to convert itself into a company under the Companies Acts, 1862 to 1890, or to amalgamate with or transfer its engagements to any such company."

The Royal Co-operative Collecting Society was a friendly society registered under the Friendly Societies Act, 1896, having its chief offices at Birmingham. Its objects, as defined by rule 2, were "To raise funds by entrance fees, by contributions of the members, fines, donations, and by interest on capital for the following purposes—namely, insuring sums of money to be paid on the death of a member, or for the funeral expenses of the husband, wife, or child of a member, or the widow of a deceased member, for rendering assistance to members when sick and thereby not able to follow their employment, and for the endowment of members or nominees of members."

By rule 3, the amendment or alteration of the society's rules required a resolution passed by a two-thirds majority at a general meeting of which previous notice had been given.

In September, 1909, a notice was advertised in two of the local newspapers of a special general meeting to be held on October 18 "for the purpose of considering the question of converting the said society into a company limited by guarantee and having a share capital under the Companies Consolidation Act, 1908, in pursuance of s. 71 of the Friendly Societies Act, 1896, and if thought fit of passing the following resolution." The resolution proposed to convert the society into a company under the title of "The Royal Co-operative Life and General Insurance Company, Limited," with a memorandum of association which was scheduled to the resolution, and having objects numbered from A to X and including (B) "To carry on the business of life assurance in all its branches and to carry on all kinds of insurance business whatsoever" (except insuring employers against workmen's compensation claims) "including the business of fire, accident, third party, burglary and theft, marine, boiler, plate glass and transit insurance." The new company was to have a capital of 100,000*l.* in 1*l.* shares, but the shares and shareholders were to be distinct from the members of the society, who were to be special members with very limited rights. The assets of the society were to become the property of the new company, and subject to be applied in the discharge of its liabilities incurred in carrying on its general business. The limit of liability by guarantee was to be 1*d.* for each member. This resolution was duly passed and confirmed at meetings of the society held on October 28 and November 8, 1909.

The number of members of the society was stated to be very large, amounting to some thousands, consisting for the most part of poor people; they were scattered all over the country, but chiefly in the northern counties.

The plaintiff had effected a policy on his own life with the society on June 14, 1909, at a premium of 8*d.* a month, and had paid about 2*s.* in respect of the same.

The plaintiff on behalf of himself and all other members of the society (except the defendants) commenced this action against the trustees, the secretary, and the committee of management of the society, and now moved for an interim injunction to restrain the defendants from registering or acting upon the resolution so

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passed and confirmed at the meetings held on October 28 and November 8, 1909, for the conversion of the society into a limited company.

The motion came on for hearing before Joyce J. on November 23, 1909.

Hughes, K.C., J. Rutherford, and *Baden Fuller,* for the plaintiff.

Gore-Browne, K.C., Roope Reeve, and *D. G. Hemmant,* for the defendants.

Nov. 30, 1909. JOYCE J. The Royal Co-operative Collecting Society is a friendly society registered under the Friendly Societies Act, 1896. The objects of the society are set forth in rule 2. [His Lordship read them, and continued:—] The Act requires the mode of amendment or alteration of the rules to be set forth in the rules. It is not very clearly set forth in the rules of this society, but if I have properly appreciated the provisions of rule 3, I think they come to this, that a general meeting of which due notice has been given may, by a majority, alter the rules. [Having read s. 8 and the sub-sections referring to friendly societies (1), his Lordship continued:—] The objects of friendly

(1) Sect. 8 of the Friendly Societies Act, 1896, defines the class of friendly societies that may be registered as follows: "For

"(*a*) the relief or maintenance of the members, their husbands, wives, children, fathers, mothers, brothers, or sisters, nephews or nieces, or wards being orphans, during sickness or other infirmity, whether bodily or mental, in old age (which shall mean any age after fifty) or in widowhood, or for the relief or maintenance of the orphan children of members during minority; or

"(*b*) insuring money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the husband, wife, or child of a member, or of the widow of a deceased member, or, as respects persons of the Jewish persuasion, for the payment of a sum of money during the period of confined mourning; or

"(*c*) the relief or maintenance of the members when on travel in search of employment, or when in distressed circumstances, or in case of shipwreck, or loss or damage of or to boats or nets; or

"(*d*) the endowment of members or nominees of members at any age; or

"(*e*) the insurance against fire, to any amount not exceeding

societies registered under the Act of 1896 are confined to the purposes which are specified or referred to in the various sub-sections of s. 8 of the Act, and no doubt, within the limitations of this section, the objects of the Royal Co-operative Collecting Society might be enlarged.

Under s. 70, sub-ss. 1 and 2, of the Act, by a special resolution, which is defined in s. 74, and which is similar to a special resolution under the Companies Acts, a society may amalgamate with or transfer its engagements to another friendly society registered under the Act, and by s. 71, sub-s. 1, a friendly society under the Act may convert itself into or amalgamate with or transfer its liabilities and engagements to a company registered under the Companies Acts. But by s. 70, sub-s. 3, which rightly or wrongly I read as applying to every amalgamation with or transfer to either a society or a company, such amalgamation or transfer shall not be valid without "(*a*) the assent thereto of five-sixths in value of the members, given either at the meetings at which the resolution is, according to the provisions of this Act, passed and confirmed, or at one of them, or, if the members were not present thereat, in writing; and (*b*) the written consent of every person receiving or entitled to any relief, annuity, or other benefit from the funds of the society, unless the claim of that person is first duly satisfied, or adequate provision is made for satisfying that claim."

The number of members of the Royal Co-operative Collecting Society is, I am told, very large. It amounts to several thousands, who are scattered all over the country, but the larger number, I think, are resident in Lancashire or the northern counties. Now, without obtaining or attempting to obtain any such assent as is particularly mentioned in sub-s. 3 of s. 70, it is proposed by a special resolution under s. 74, without more, to convert the Royal Co-operative Collecting Society into a company, the title of which

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fifteen pounds, of the tools or implements of the trade or calling of the members.

"Provided that a friendly society which contracts with any person for the assurance of an annuity exceeding fifty pounds per annum, or of a gross sum exceeding two hundred pounds, shall not be registered under this Act."

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is or is proposed to be The Royal Co-operative Life and General Insurance Company, Limited, the objects of which, as specified in the memorandum of association, embrace the carrying on of the business of life assurance in all its branches. [Having referred at some length to the memorandum of association, his Lordship continued :—]

Now, without going so far as to say that the objects of the company into which a friendly society may be converted under s. 73 must be precisely limited to the existing objects of the friendly society as defined in the rules specifying the objects of such a society, or must be strictly confined to such objects as are specified or referred to in s. 8 of the Act, I am of opinion that a friendly society cannot, under the guise of conversion into a company in pursuance of s. 71, by a mere special resolution as defined in s. 74, and without any such consents as are required under s. 70, sub-s. 3, be transformed into, for instance, a brewery company. I mention a brewery company because that was the instance which was suggested in the course of the argument and which was more or less discussed before me. I am of opinion that it cannot in that way be converted into a company having a range of objects so much more extensive and going so far beyond those specified in rule 2 of this society, or described or referred to in s. 8 of the Act, or constituted so differently from a friendly society as the proposed company in this case.

That being my view, it does not appear to me to be necessary to consider many other objections which were raised and more or less discussed before me as to what was proposed to be done. If necessary, I think that some, at all events, of those objections would be entitled to most serious consideration.

An objection was urged before me founded upon the very small pecuniary interest of the plaintiff in this case, and no doubt such pecuniary interest is very small indeed, but he sues, as the practice of the Court allows, on behalf of himself and all others the members of the friendly society, except the defendants in the action. They are very numerous, and for the most part they are very poor people. There is not the slightest imputation raised with regard to the motives or conduct of the plaintiff, and therefore I think that the small pecuniary interest of the plaintiff is

no ground for any objection to the Court doing what it otherwise considers it ought to do.

The consequence is that there must be an injunction until the trial of the action restraining the defendants from registering or acting upon the resolution in question.

R. M.

The defendants appealed.

The appeal was heard on January 11, 1910.

C. A.

Gore-Browne, K.C., Roope Reeve, and *D. G. Hemmant,* for the appellants. The society was doing a large life insurance business, which was subject to the limitations of the Friendly Societies Act, 1896, but now that the society is prosperous it can be advantageously extended by converting itself into a company under the Companies Acts and so obtain wider powers. Under s. 71, sub-s. 1, a society can amalgamate with or transfer its engagements to an existing limited company.

[COZENS-HARDY M.R. You will not tempt us to express any opinion as to amalgamation or transfer: the sole question before us is whether this society can convert itself into a company with these enlarged objects.]

There is no suggestion in the Act of 1896 that when a society does convert itself into a company it is not to have wider objects and powers; the conversion is nowhere limited to conversion into a company with identical objects and powers. Sect. 8, sub-s. 1, defining the objects, is no more obligatory on a company when converted than ss. 23, 24, and 25, which deal with the consequences of registry under the Friendly Societies Act, 1896. "A company" must mean any company—a mining company if necessary. All the necessary consents can be obtained. The plaintiff is the only member who raises any objection, and his holding is very small.

Hughes, K.C., J. Rutherford, and *Baden Fuller,* for the respondent, were not called upon.

COZENS-HARDY M.R. After listening to the interesting and able arguments of the appellants' counsel, who have put before

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us every point which can fairly be addressed to us, I am bound to say that I think this is a most hopeless appeal.

We are dealing with a society registered under the Friendly Societies Act of 1896 and consisting of a great many members—a society which claims the benefits and advantages and accepts the burdens of that Act. The objects of a friendly society such as this are stated and prescribed in s. 8, and a society under the Act of 1896 cannot do anything outside those objects. To take one instance, it is quite plain that it cannot effect an insurance against fire to an amount exceeding 15*l.*, and then only to that amount on tools of the trade or calling of the members. It is a society which confers many privileges on the members; amongst others, by s. 23, that "the subscription of a person being or having been a member of a registered society or branch shall not be recoverable at law"; but it was then thought by Parliament that this friendly society, which is a quasi-corporation, having a right to sue by trustees and a right to do that which otherwise a large association of members could only do if it were registered as a corporation, might, by s. 71, sub-s. 1, by a special resolution determine to convert itself into a company under the Companies Acts. The words of the sub-section are "to convert itself," and the proposition which has been urged before us is that those words authorize the society to convert itself into a company under the Companies Acts with greater and enlarged objects such as were not lawful to the society as a friendly society registered under the Act of 1896, and Mr. Reeve has not shrunk from a conclusion which I think he was quite right in putting before us, that s. 71, sub-s. 1, authorizes the society by special resolution to convert itself into any kind of company—a brewery company, a mining company, a grocery company, or anything you like—and that by the simple passing of a resolution it at once escapes the fetters imposed by s. 8 of the Act of 1896, and gets rid of the corresponding, though not quite the equivalent, fetter imposed under the Companies Acts, namely, that no enlargement of the objects of a company can be effected without the order of the Court in addition to a special resolution. Now is that a possible contention? It does seem to me to be a wholly impossible construction of this section.

It is the duty of the Court, and it is the habit of the Court, to control and confine bodies of this nature, whether companies or quasi-corporations, strictly within the objects prescribed for them by statute, and I cannot bring myself to doubt that what has been attempted here is unauthorized by the Act, is plainly contrary to the scheme and policy of the Act, and must be restrained by injunction. All that the society can do by special resolution under s. 71, sub-s. 1, is a matter of machinery. Here is a friendly society with certain limited objects; it is not a corporation; but it may convert itself with those objects into a limited company, and when it is a limited company it may then exercise such powers of enlarging and altering its objects, with the sanction of the Court, as are given by the Companies Acts. I advisedly abstain from saying anything more about the various points which have been raised by counsel. I would only just add this: that having regard to s. 23 I have the greatest possible doubt whether the society by converting itself into a company can impose any liability whatever on its members or create that a debt which was not a debt before. But that again does not arise here. I think the learned judge was perfectly right in the view he took, and that the defendants must be restrained by injunction from acting upon the special resolution which they passed for enlarging the objects of this company.

FLETCHER MOULTON L.J. I entirely agree with the judgment which the Master of the Rolls has just delivered, and I will only add a few words.

It appears to me that the Legislature has very rightly extended its favour to certain forms of more or less humble types of action for the purpose of mutual protection which it has distinguished by allowing them to be performed by societies of exceptional structure with exceptional privileges called friendly societies. To enjoy those privileges and to have that machinery, the objects of the society must be confined within narrow statutory limits. But to attain those objects it is not by any means necessary that you should avail yourself of this special structure or of these special privileges. There are other means

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whereby bodies can be formed which can do all that friendly societies do, and it may very well happen in the history of these societies, that when prosperity comes to them, as it so often has come, they may find themselves strong enough to do without this legislative assistance and may feel that greater freedom is better for the purpose of carrying out their objects. The Legislature in this Act says that under such circumstances the society may change its structure, and may accept the organization of one or other of the well-known forms of companies. But by thus converting itself into a company, it is going to abandon its original structure and to abandon its privileges. Then what is it that still remains identical and unchanged? It must be the objects of the company, and I cannot doubt that this conversion of a friendly society into a company means into a company with identically the same objects. It must not be thought that I consider that when it has changed itself into a company in that way and commenced its new life it is in any sense in a different position from any other company of the same type. All the legitimate modes of growth and extension which apply to its new form of existence, i.e., which apply to companies of the type of which it now is, apply to it, but at the moment of change it must be a change of the society into a company which has identically the same objects, though it intends to carry them out by a different machinery. Now, if that be the right interpretation of this Act, this appeal is hopeless. It is quite clear that the intention is to change this friendly society into a company with objects which it could not have as a friendly society. That is beyond the purview of the statute. The Master of the Rolls has pointed out the difficulty that must arise if you are to take "a company" to mean any company, and to permit a friendly society to change itself into a company for any purpose whatever simply by the consent of the members, and this appears to me to be a reductio ad absurdum of the contention of the appellants.

I am of opinion, therefore, that this appeal must be dismissed.

BUCKLEY L.J. The Royal Co-operative Collecting Society is a society which was formed and registered in the year 1899 as a friendly society under the Friendly Societies Act, 1896, and

is one which thus enjoys the benefits and is subject to the limitations and restrictions which are imposed by that Act. The society proposed to avail itself of s. 71 of the Act of Parliament and to convert itself into a company under the Companies Acts, 1862 to 1890. I have no doubt myself what that section intended to effect. These friendly societies have done very useful work in this country. They have many of them attained very large dimensions. The machinery of the Friendly Societies Act is in many respects not as convenient as that of the Companies Acts, and the purpose of this section was to enable societies of this kind to assume a different legal structure by becoming companies under the Companies Acts instead of societies under the Friendly Societies Act, and to carry on their business in a different form and with in many respects greater freedom. This society, being minded to avail itself of s. 71 of that Act, proposes not merely to change its legal structure and become a legal entity governed by one Act of Parliament as distinguished from another Act of Parliament, but to alter, enlarge, and profoundly modify its objects. Its objects as a friendly society were necessarily confined within those mentioned in s. 8 of the Friendly Societies Act, 1896. This society proposes to take a memorandum of association which contains objects running from A to X in the alphabet, covering every description of insurance and a vast mass of business, unlimited in point of amount, such as was not within its powers at all under the Act of 1896. If and when it had by registration under the Companies Acts become a company, it could have enlarged its objects under the appropriate sections in the Companies Acts. If it had sought to do so it would have had to come to the Court and obtain the sanction of the Court to those enlargements of its objects, and there are many considerations which would weigh with the Court in giving or withholding its sanction. The Court considers what is fair to the existing creditors of the company which proposes to enlarge or alter its objects. It considers what is fair to the persons who have invested their money in the company which seeks to enlarge or alter its objects. It does not give its sanction unless it is satisfied that the alterations proposed fall within the language of s. 9 of the Companies

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Act, 1908, and are reasonable and fair to all parties interested. But this society desires to do this without consulting anybody. Counsel agree, indeed they could not dispute, that the society could not so enlarge its objects under the Friendly Societies Act of 1896. It is quite beyond anything in that Act. They also have to confess that they cannot do it under the Companies Acts for two reasons. In the first place, they are not under the Companies Acts yet until they are registered under them, and, secondly, if they were, they could not do it without the sanction of the Court. But they seek to say that at some moment of time —I cannot myself grasp when it is—they are governed neither by the one Act nor by the other, but are free to do just what they please by way of alteration of their objects. To my mind that is entirely wrong. Until they are registered under the Companies Acts they are a society under the Friendly Societies Act, and have no power to do it under the Friendly Societies Act. If and when they become registered under the Companies Acts, they can enlarge their objects, but they must come to the Court and get the Court's sanction. They want to say that at some intermediate point of time they are free to convert themselves, as they say, into a company being any such company as they choose with any objects they like. In my opinion s. 71 authorizes nothing of the sort. Sect. 71 simply meant to provide that they might change their legal structure, but the new entity existing under the new legal structure was to be a reproduction of the previous entity with different machinery for its government. That is not what they are proposing to do at all. I think these resolutions are impossible and that the learned judge was quite right in granting an injunction to restrain the defendants from acting upon them.

Solicitors: *H. Kingsley Wood; Leggatts & Carruthers, for Carruthers & Gedye, Liverpool.*

W. C. D.

In re RHODESIA GOLDFIELDS, LIMITED. PARTRIDGE *v.* RHODESIA GOLDFIELDS, LIMITED.

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1909
Dec. 14, 15.

[1907 R. 454.]

Company—Debenture Stockholders' Action—Distribution of Fund in Court—Company in Liquidation—Debenture Stock Trust Deed—No Condition protecting Transferees against Equities — Stockholder a Trustee and Director—Alleged Debt by Stockholder to Company—Retention of Shares of Stockholder and his Transferees.

Where a trust fund is being distributed by the Court, a trustee-beneficiary against whom proceedings are pending for moneys alleged to belong to the fund cannot take any share until the amount (if any) due from him has been ascertained and made good.

After the appointment of a receiver in a debenture stockholder's action and a winding-up order, a stockholder, who was also a trustee of the deed securing the stock and a director, transferred 10,000*l.* stock to certain transferees.

The certificate in the action found that 250*l.* stock belonged to the transferor and 10,000*l.* to the transferees.

Among the assets certified as now subject to the trust deed was a debt alleged to be owing by the transferor to the company for moneys alleged to have been had and received by him while a director.

Proceedings were being taken to establish this alleged debt, but the amount (if any) due was not yet ascertained or established.

The trust deed did not contain any condition protecting the transferees from any equity, set-off, or cross-claim of the company against the transferor.

The fund in Court realized in the action was more than sufficient to pay the stockholders in full, and it was proposed to distribute it on the further consideration:—

Held that, pending the ascertainment and establishment of the amount (if any) due from the transferor, the amounts due to the transferor and the transferees must be retained and carried to separate accounts.

In re Akerman, [1891] 3 Ch. 212, 219; *In re Goy & Co., Ld.*, [1900] 2 Ch. 149, 153; and *In re Brown & Gregory, Ld.*, [1904] 1 Ch. 627; [1904] 2 Ch. 448, applied.

FURTHER CONSIDERATION.

This was the further consideration of a debenture stockholders' action.

The stock, which carried 5 per cent. interest payable on January 1 and July 1 in each year, was secured by a trust deed of October 31, 1899, giving the trustees a floating charge on the

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company's assets. Any surplus on realization was to be held in trust for the company. The plaintiff Partridge was one of the trustees. He was also a director and a stockholder.

On March 9, 1907, the debenture stockholders' action was commenced, and on March 15 a receiver was appointed. On March 12, 1907, the company presented a winding-up petition, alleging that it was no longer able to carry out at a profit the objects for which it was established, and was unable to pay any debts that might be incurred in the continuance of its business, and on March 26 a compulsory winding-up order was made.

On May 23, 1907, Partridge transferred 10,000*l.* stock to the trustees of his sister's marriage settlement in exchange for 10,000*l.* debentures of the French South African Development Company, Limited, which had defaulted in payment of its interest. A mortgage given by Partridge to the trustees to secure payment of that interest was at the same time handed back. The consideration in the transfer was expressed to be 5*s.* and it bore the following indorsement:—

"I hereby certify that the consideration on this transfer is nominal, no money having passed.

"Henry Partridge."

This transfer was registered by the receiver, and a fresh certificate handed to the transferees, signed by the receiver, but without the seal of the company.

On May 4, 1909, the conduct of the action was given to the defendant Game, another stockholder.

On May 13, 1909, the certificate in the action was made. It certified (inter alia) that 82,000*l.* of the stock was still outstanding, of which the plaintiff Partridge held 250*l.* and his transferees 10,000*l.* All interest had been paid up to January 1, 1909, and further interest was credited up to the date of the certificate. Among the assets now subject to the trust deed were certain claims against Partridge and the other directors (inter alia) "In respect of profits received by such directors of the company as were members of the firm of Partridge and Jarvis from the purchase and sale to or the acquisition by the company of stocks and shares."

Partridge was a member of the above firm. Proceedings were being taken to enforce these claims, which if substantiated would amount to a considerable sum, but the claims as yet were neither definitely ascertained nor substantiated.

In these circumstances the question arose whether upon the payment out of Court of the amounts owing to the stockholders on the distribution of the fund realized in the action, which was more than enough to pay them in full, the Court ought for the present to retain the amounts due to Partridge and his transferees and carry them to separate accounts. The party with conduct of the action had issued a summons asking that this should be done.

The trust deed did not contain the common form condition that "the transferee will be recognized as entitled to the stock free from any equity, set-off, or cross-claim of the company against the transferor": Palmer's Company Precedents, 10th ed., pt. III., p. 321, condition 9.

Jenkins, K.C., and *G. F. Hart*, for the party with conduct of the action, asked that the amounts certified to be due to Partridge and his transferees should be retained and carried to separate accounts.

Hon. Frank Russell, K.C., and *Bischoff*, for the company. Partridge was a trustee for the stockholders to the amount of their stock and a trustee of the surplus for the company. He cannot share in the distribution without paying what he owes for money had and received on behalf of the company.

The transferees, who took by a voluntary transfer after the action and the winding-up, are in no better position: *In re Brown & Gregory, Ld.* (1) In that case there was actually a condition that "the principal moneys, bonus, and interest hereby secured will be paid without regard to any equities between the company and the original and any intermediate holder." There is no such condition here, and the present case follows a fortiori. The general principle is stated in *In re Goy & Co., Ld.* (2)

Ward Coldridge, for Partridge and his transferees. *In re Brown & Gregory, Ld.* (1) and *In re Goy & Co., Ld.* (2) were

(1) [1904] 1 Ch. 627; [1904] 2 Ch. 448. (2) [1900] 2 Ch. 149, 153.

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cases of debts ascertained and established before the fund was distributed. In the present case there are merely claims which may or may not result in a debt against Partridge.

[SWINFEN EADY J. The claim is for a liquidated demand. A plaintiff can sue for money had and received without specifying the amount.]

That is so, but the amount could not be set off against a cross-claim until it was definitely ascertained and established: *Christie* v. *Taunton, Delmard, Lane & Co.* (1)

[SWINFEN EADY J. The company could not set off a future debt, e.g., a future call. The present claim is for an existing debt.]

It is only an inchoate liability. It is not a debt until the amount (if any) due is ascertained and established: *Ex parte Theys.* (2)

[SWINFEN EADY J. That was a claim for damages for misfeasance, so there was no debt until judgment. But the present case is not governed by any technical questions of set-off. It falls within the far wider principle that a person who owes an estate money cannot claim an aliquot share without first making good what he owes: *In re Akerman.* (3)]

That principle assumes an established debt. It has never been applied to a mere inchoate liability which may or may not be established as a debt. Executors cannot retain a share of residue against future instalments of a debt payable by instalments: *In re Abrahams.* (4)

[SWINFEN EADY J. Because the instalments are not presently payable. Your debt is immediately payable subject to the amount (if any) being ascertained.]

It is not payable until the amount is ascertained and established. Until then it is a mere possible inchoate liability.

Even if Partridge's 250*l.* is retained, the 10,000*l.* belonging to the transferees ought not to be retained. In *In re Brown & Gregory, Ld.* (5) the transferee was merely a trustee for the transferors and their creditors. Here the transfer was made on

(1) [1893] 2 Ch. 175.
(2) (1884) 25 Ch. D. 587, 594.
(3) [1891] 3 Ch. 212, 219.
(4) [1908] 2 Ch. 69.
(5) [1904] 1 Ch. 627; [1904] 2 Ch. 448.

an exchange for valuable consideration, and the transferees had no notice of any claim against Partridge.

[SWINFEN EADY J. The transfer, which is under seal, states that the consideration was nominal, and it is stamped accordingly.]

That is a matter for the Inland Revenue. It does not estop the parties from setting up the true consideration. The company cannot set off against the transferees any debt of Partridge accruing since the transfer was sent in for registration: *Watson* v. *Mid Wales Ry. Co.* (1), approved in *Newfoundland Government* v. *Newfoundland Ry. Co.* (2)

[SWINFEN EADY J. In the present case the transfer was by a trustee against whom claims for money had and received existed prior to the transfer. Can his transferees take the fund due to him as cestui que trust free from those claims?: *Hooper* v. *Smart* (3); *Evans* v. *Benyon* (4); *Chillingworth* v. *Chambers.* (5)]

If the liability were definitely established before the Court had parted with the fund there might be a difficulty. But there is no case in which the Court has retained control of a fund simply for the purpose of providing money for payment of alleged personal claims that may or may not be substantiated against the parties entitled to the fund.

A. M. W. Wells, for the other trustee.

Hon. Frank Russell, K.C., in reply. The trust deed omits the ordinary condition making the transfer free from equities, and the transferees' certificate is not under the company's seal. Partridge and the transferees are therefore in the same position. I do not dispute that a future debt cannot be set off. But this is not a case of set-off. It is a case of a trustee-beneficiary making good a trust fund before taking any share of it.

In *In re Goy & Co., Ld.* (6) the company was wound up in May, 1898, and judgment was given in the debenture-holders' action in June, 1898. Chandler, a director, transferred debentures for value to Robey in September, 1898. In October, 1898, the liquidator discovered grounds for alleging that Chandler had

(1) (1867) L. R. 2 C. P. 593, 598.
(2) (1888) 13 App. Cas. 199, 211.
(3) (1875) 1 Ch. D. 90.
(4) (1887) 37 Ch. D. 329.
(5) [1896] 1 Ch. 685.
(6) [1900] 2 Ch. 149, 154.

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received 300*l.* of the company's moneys, and subsequently took proceedings to recover the amount. The certificate in the debenture-holders' action dated February 3, 1899, mentioned that proceedings for the 300*l.* were pending against Chandler. The company obtained judgment for the 300*l.* in March, 1899. The further consideration of the debenture-holders' action came on in March, 1900.

Stirling J. held that if Chandler had retained the debentures he could not share in the distribution without paying the 300*l.* With regard to Robey he said, "As a general rule the transferee of a chose in action stands in no better position than his transferor," but, having regard to the special condition that the debenture moneys would be paid "without regard to any equities between the company and the original or any intermediate holder thereof," he decided in favour of Robey's title. There is no such condition in the present case and the general rule applies. The fact that the debt is not yet ascertained or established is immaterial. There is no obligation on the Court to distribute any portion of the fund at this moment. It is quite entitled to keep the entire fund back. It is unnecessary, however, to go that length. It is sufficient to keep control over the portion due to Partridge and the transferees. It would not be right to pay out that portion with notice of the large pending claim.

SWINFEN EADY J. The question arising on this further consideration is whether upon payment out of Court to the debenture stockholders of the amounts owing to them upon a distribution of the fund realized in the action the Court ought to retain for the present the amounts appearing by the certificate to be due to Partridge and his transferees, who took their transfer during the progress of the action.

Partridge was a director of the company and one of the trustees for the debenture stockholders. It is alleged that he is largely indebted to the company. The amount, if any, of that alleged indebtedness has not yet been ascertained, but the proceedings have been before me sufficiently for me to know that the claim against him is of a very serious character. I am speaking from

recollection, and I shall be corrected if I am wrong, but my recollection is that I refused to sanction the acceptance of 7500*l.* or thereabouts in satisfaction of these liabilities, because, having regard to the facts that were before me, I thought that sum insufficient, and one that I could not sanction in the interests of the parties. I thought the claims ought to be prosecuted.

One of the claims against Partridge comprised in the outstanding claims specified in the Master's certificate is "In respect of profits received by such directors of the company as were members of the firm of Partridge and Jarvis from the purchase and sale to or the acquisition by the company of stocks and shares." In other words, there is a claim against Partridge in respect of moneys which it is alleged had not really been applied in buying stocks or shares, but had passed into his pocket, and, being moneys of the company, ought not to have passed into his pocket at all. That is a claim not in damages but in debt. It is a claim that Partridge has received and received improperly moneys of the company, i.e., not moneys to which the company seeks to establish a title, but moneys actually belonging to the company, and of which it has been improperly deprived by Partridge. That is the claim, and it is only one of many claims against him. Now a claim of that sort is a claim for a debt. It may be it is a disputed debt and will have to be established. At present I do not assume that the debt is established or that Partridge owes this money; but it is a claim for a debt, just as much as if it were a claim for a disputed tailor's bill. There are also other claims referred to in the certificate. The persons having the conduct of the debenture stockholders' action and the company say that it would be inequitable to distribute the fund and pay out the money appearing to be due to Partridge and his transferees without Partridge first making good what he owes to the trust estate, because he is a trustee under the trust deed as well for the company as for the stockholders.

The principle is well settled and is not open to question. It is to be found in numerous cases.

In *In re Akerman* (1) Kekewich J. says: "The principle is to be found laid down in *Cherry* v. *Boultbee* (2) in the passage to

(1) [1891] 3 Ch. 212, 219. (2) (1839) 4 My. & Cr. 442, 447.

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which I have just referred, and also in *Courtenay* v. *Williams* (1), and no doubt, if search were made, it would be found to have been laid down in many other cases. It is this. A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate; nothing is in strict language set off; but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back. That is expanding what the Lord Chancellor calls in *Cherry* v. *Boultbee* (2) 'a right to pay out of the fund in hand,' rather than a set-off."

Again in *In re Goy & Co., Ld.* (3) Stirling J. says: "It has been repeatedly held inequitable that a person entitled to a share of a fund should receive anything in respect of that share without paying what he may be bound to contribute to the same fund. Under such circumstances the Court in effect says to the person claiming to be paid, 'You have in your own hands that which is applicable to the payment—pay yourself out of that.' This has been done on the distribution of the residuary estate of a testator where a person entitled to a share is also indebted to the estate: *Willes* v. *Greenhill* (4); *In re Akerman* (5); *In re Watson.* (6) Where two companies were in liquidation and one held shares in the other, and was at the same time a creditor, it was held that the creditor could not take any dividend until all calls due on the shares were paid: *In re Auriferous Properties.* (7) In *Ex parte Theys* (8) Cotton L.J. said that probably the principle was applicable to the distribution of a fund to which debenture-holders were entitled." It was so held by Byrne J., and his judgment was affirmed on appeal in *In re Brown & Gregory, Ld.* (9)

Various cases on the subject of set-off were referred to in order

(1) (1846) 15 L. J. (Ch.) 204.
(2) 4 My. & Cr. 442, 447.
(3) [1900] 2 Ch. 149, 153.
(4) (1860) 29 Beav. 376.
(5) [1891] 3 Ch. 212.
(6) [1896] 1 Ch. 925.
(7) [1898] 2 Ch. 428.
(8) 25 Ch. D. 587, 593.
(9) [1904] 1 Ch. 627; [1904] 2 Ch. 448.

to shew that an unliquidated demand cannot be set off against a liquidated debt, or a debt not due against one that is due; but this rule is of much wider application than the doctrine of set-off. In my judgment the rule is of general application that where an estate is being administered by the Court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund. It is immaterial whether the amount is actually ascertained or not. If it is not actually ascertained it must be ascertained in order that the rights of the parties may be adjusted, and it would be a strange travesty of equity to hold that in distributing the fund Partridge was entitled to be paid at once all that was due to him out of the company's money, and subsequently to find, after it had been established that he owed money to the fund, that the amount could not be recovered from him.

The transferees are in the same position. In *Goy's Case* (1) Stirling J. first considered how the matter would stand if the debentures had been still retained by the transferor, and held, or was prepared to hold, that in that case the transferor would have been bound to contribute to the fund, and it could have been retained. The only reason why a different view ultimately prevailed as to the transferee was by reason of the contract contained in the instrument: the debtor had contracted that he would not avail himself against a transferee of any right which he might possess against the creditor. In the present case that element does not exist. It has been pointed out that the common form clause in trust deeds of debenture stock, that the transferee of the stock would be recognized as entitled to the stock free from any equity, set-off, or cross-claim by the company against the transferor, does not appear in the present trust deed. Prima facie the general rule cannot be disputed that the transferee of a chose in action stands in no better position than the transferor; none the less when the transferor is the trustee of the instrument, and none the less when the transfer is made after the company has come to grief and after the receiver is in possession. In the present case the transferees of the stock did not even obtain the certificate under the seal of the company. They

(1) [1900] 2 Ch. 149, 153.

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have merely an acknowledgment by the receiver of the transfer after it has been lodged. It really does not amount to more than that. In any case I am of opinion that until the rights of the company as between the company and Partridge are ascertained —and they are in process of being ascertained, and steps are now being taken for that purpose—it would not be right for the Court to pay the amounts due to Partridge or his transferees without ascertaining what sum, if any, Partridge owes to the company. In these circumstances I am of opinion that these amounts ought to be carried over to separate accounts subject to further order.

Leave to appeal refused by Swinfen Eady J. and the Court of Appeal.

Solicitors: *Simmons & Simmons; Chamberlain & Co.; Ashurst, Morris, Crisp & Co.*

G. R. A.

NEVILLE J.
1909
Dec. 7, 8, 9.

WARWICK TYRE COMPANY, LIMITED *v.* NEW MOTOR AND GENERAL RUBBER COMPANY, LIMITED.

[1909 W. 118.]

Trade Name—Passing-off Action—Parties—Injunction.

For many years the plaintiffs manufactured and sold tyres for cycles and motor cycles under the name of "Warwick," and by the year 1905 that name was distinctive and meant to the trade and to the public tyres of their manufacture. In 1905 they transferred their business with the exclusive right to manufacture and sell Warwick tyres to the Dunlop Company for a term of years, but did not assign the goodwill in their trade name of "Warwick" to that company. The plaintiffs never manufactured or sold tyres for motor cars, nor did the Dunlop Company sell such tyres under the name of "Warwick." The defendants manufactured and sold only tyres for motor cars, and in 1908, the name of their managing director being Warwick, commenced to sell their motor tyres under the name of "Warwick motor tyres." In an action by the plaintiffs to restrain the defendants from using the name "Warwick" in connection with the sale of the defendants' motor tyres on the ground that such user was calculated to lead the public to believe that the defendants' motor tyres were tyres of the plaintiffs' manufacture:—

Held, on the evidence, that the plaintiffs were entitled to an injunction.

Held, also, that the plaintiffs, although they were not themselves manufacturing or selling their Warwick tyres, were the proper parties

to sue, as they had not parted with the goodwill in their trade name "Warwick," and that the Dunlop Company were not necessary parties to the action.

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ACTION.

The plaintiff company, who were incorporated in August, 1900, alleged by their statement of claim that their business consisted of the manufacture and sale of pneumatic tyres for cycles, bicycles, velocipedes, and carriages and vehicles of all kinds; that since their incorporation they had sold and dealt in pneumatic tyres for cycles under the name "Warwick," and had since that date continuously and extensively advertised the said name in connection with tyres of their manufacture and merchandise; that since 1900 the name "Warwick" had been extensively and exclusively used by them in connection with pneumatic tyres of their manufacture and merchandise; and that by reason of the facts above stated the said name as applied to tyres had become and was distinctive of their tyres, and had long meant and now meant both to the trade and to the public tyres of their manufacture and merchandise and none other. The plaintiffs further alleged that the defendants, well knowing the reputation that had been acquired as aforesaid by the plaintiffs in the said distinctive name "Warwick," had with the object of passing off tyres of their manufacture and merchandise as and for the tyres of the plaintiffs applied the said distinctive name "Warwick" to tyres not being the plaintiffs' tyres, and had described such tyres thereby in catalogues, circulars, and advertisements, and had sold and offered for sale tyres not of the plaintiffs' manufacture or merchandise under the said name; that the said wrongful acts of the defendants were calculated and designed to lead the public to believe that tyres of the defendants' manufacture and merchandise were tyres of the plaintiffs' manufacture and merchandise, and that unless the defendants were restrained from continuing the said wrongful acts the public would be deceived and the trade of the plaintiffs greatly injured, and tyres of the defendants' manufacture and merchandise would be passed off and sold as and for the tyres of the plaintiffs; that the plaintiffs had suffered loss in their trade and business by reason of the said wrongful conduct of the defendants; and the

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plaintiffs claimed an injunction and the usual consequential relief.

The defendants by their defence admitted that the plaintiffs manufactured and sold pneumatic tyres for cycles under the name "Warwick," but save as aforesaid they did not admit any of the statements in the statement of claim, and they denied that the plaintiffs had ever manufactured or sold motor tyres. They also denied that the name "Warwick" as applied to motor tyres had become or was distinctive of the plaintiffs' tyres, or that the said name now meant or ever had meant either to the trade or to the public motor tyres of the manufacture or merchandise of the plaintiffs. They further denied that anything they had done had been with knowledge that the plaintiffs had acquired any reputation in the name "Warwick" in connection with motor tyres, and they alleged that the plaintiffs had in fact no such reputation. They also denied that anything they had done had been with the object of passing off their motor tyres as and for the plaintiffs' motor tyres, or that anything they had done could have that effect, or that the plaintiffs had ever dealt in motor tyres. They admitted that the name "Warwick" (which was the name of their managing director) had been used by them in connection with motor tyres not being motor tyres of the plaintiffs, and they claimed to be entitled to do so; and they alleged that motor tyres were entirely distinct from cycle tyres, that the one could not be used for the same purposes as the other, and that nothing done by them could have the effect of diminishing the plaintiffs' sales to the smallest possible extent.

It appeared from the evidence that in 1905 the plaintiffs entered into an advantageous arrangement with the Dunlop Pneumatic Tyre Company, under which they transferred their business with the exclusive right to make and sell their Warwick tyres to that company for a term of years, but they did not assign the goodwill in their trade name "Warwick" to that company. Since 1905 the plaintiffs had not themselves made or sold any goods, but their Warwick tyres had been largely advertised and made and sold by the Dunlop Company. The other material facts are sufficiently noticed in the arguments and judgment.

Walter, K.C., Peterson, K.C., and *J. H. Gray*, for the plaintiffs. The defendants are passing off their tyres as "Warwick" tyres, which are well known tyres the property of the plaintiffs. The defendants only make motor car tyres, which the plaintiffs do not make, but as a matter of fact there is no distinction in kind between motor tyres and cycle tyres, except in size and strength, and both classes of goods are generally made and sold by manufacturers and dealers in the tyre trade. Even if the plaintiffs never made a motor car tyre, the defendants could not use the name "Warwick," to which the plaintiffs are entitled, and which suggests the plaintiffs for any goods in any degree similar: *Dunlop Pneumatic Tyre Co.* v. *Dunlop Lubricant Co.* (1); *Eastman Photographic Materials Co.* v. *John Griffiths Cycle Corporation.* (2) Although the name of the managing director of the defendants is Warwick, they have never carried on business in the name of Warwick, and therefore they do not come within the principle of *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.* (3), where Lord James of Hereford lays down the conditions under which a man of the same name as a plaintiff may succeed in contending that no one will be deceived by his carrying on business in his own name. On the evidence the plaintiffs are entitled to an injunction.

Jenkins, K.C., and *Sebastian*, for the defendants. If this were an application by the defendants to register the name "Warwick" one would have to consider whether the name was calculated to mislead, but the plaintiffs' case is that we are passing off our goods as their goods. A motor tyre as known in the market means a tyre for motor cars and is not equivalent to a cycle tyre or motor cycle tyre. The plaintiffs do not make motor tyres, and the defendants, who only make motor tyres and do not intend to make cycle tyres, have no intention of attracting any trade of the plaintiffs for their motor tyres. There can be no confusion in the trade between motor tyres and cycle tyres, because motor tyres are a distinct branch of the industry. It is not a case of competing businesses, nor a case of passing off our goods as the plaintiffs' goods. We are not selling the same article

(1) (1898) 16 Rep. Pat. Cas. 12. (2) (1898) 15 Rep. Pat. Cas. 105, 110.
(3) [1907] A. C. 430.

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as the plaintiffs. It is said that we are selling an analogous article that may lead to confusion, but there is no evidence that any one has been misled. The plaintiffs have no reputation for motor car tyres and are not entitled to an injunction: *Turner's Motor Manufacturing Co.* v. *Miesse Petrol Car Syndicate* (1); *Joseph Lucas, Ld.* v. *Fabry Automobile Co.* (2); *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.* (3) In *Reddaway* v. *Banham* (4) Lord Herschell points out that in a passing-off case "the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff." *Leahy* v. *Glover* (5) is to the same effect. Here our evidence shews an innocent origin of the name "Warwick," and it is not a case of a trade name, but of a particular article which the plaintiffs do not make or sell, and a purchaser could not get from us the articles that the plaintiffs sell.

[NEVILLE J. referred to *Eastman Photographic Materials Co.* v. *John Griffiths Cycle Corporation.* (6)]

That was a gross case of fraud. That element does not exist here. Our customers come to us because they prefer our goods, knowing that they are not the plaintiffs', and not a single order we have had could be supplied by the plaintiffs.

In the next place, the agreement of 1905 shews that the Dunlop Company ought to be co-plaintiffs. Since 1905 the plaintiffs have not manufactured or sold their tyres, and since that date their name is not mentioned in any circular, and there is no indication of the true ownership of the Warwick tyre. It is the Dunlop Company who since 1905 have had in the view of the public the reputation and sale of the plaintiffs' goods and who have the sole control and right to make and sell the Warwick cycle tyres, and who in their circulars and advertisements put forward that they make the Warwick tyre as one of their brands. We are not passing off their goods. Our motor tyres command

(1) (1907) 24 Rep. Pat. Cas. 531.
(2) (1905) 23 Rep. Pat. Cas. 33.
(3) [1907] A. C. 430.
(4) [1896] A. C. 199, 210.
(5) (1891) 10 Rep. Pat. Cas. 141.
(6) 15 Rep. Pat. Cas. 105.

a higher price than the cycle tyres of the plaintiffs. Therefore there is no damage, and the plaintiffs are not entitled to succeed.

NEVILLE J. The plaintiffs are the proprietors of certain rights held by the Dunlop Pneumatic Tyre Company in a pneumatic tyre known as the Warwick tyre. That tyre has been on the market ever since 1896. It has been widely advertised, largely sold, and has a wide and general reputation under that name amongst those persons who have any acquaintance with the tyre trade. The name has been applied exclusively hitherto to the manufacture of cycle tyres and motor cycle tyres, and there is no evidence of any intention on the part of the plaintiffs or those who act for them to apply the name to the sale of motor tyres. That being the position of affairs, the advertisements of this Warwick tyre being still placed before the public and the trade, the New Motor and General Rubber Company, who manufactured motor tyres, took it into their heads to call their tyres "Warwick motor tyres," and advertised their goods in that way. Apparently they called attention to what they were doing, as appears from the photograph of their stall at the exhibition, in which they advertise Warwick motor tyres in connection with the Daimler Motor Company hire department, a department which they supplied with motor tyres. The question that arises upon those facts is whether the Warwick Tyre Company are entitled to an injunction to restrain the defendants from using their trade name of "Warwick" in connection with the sale of motor tyres. I will deal with the actual position of the plaintiff company later on. The defendants call as a witness their managing director, whose name is Warwick, and who is the patentee of a certain invention in regard to the treads of motor tyres, and he gives an account of how it came about that he, on behalf of his company, determined to alter his method of sale, and to place his motor tyres upon the market under the designation of "Warwick motor tyres." [His Lordship then dealt with Mr. Warwick's explanation of the circumstances which caused him to adopt the name of "Warwick" for the sale of the defendants' motor tyres and held that it was insufficient and

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unsatisfactory, and continued:—] The plaintiffs' evidence is to the effect that tyre makers and dealers as a rule deal both in cycle tyres and in motor tyres, the principle of construction of the two articles being identical, but they agree that there are cases where people only deal in cycle tyres, and there are cases in which people only deal in motor tyres, but it is not the general rule, and I think that the tyre trade, speaking generally, is one and undivided dealing both with cycle tyres and also with motor tyres. Now Mr. Warwick tells us that when the idea was presented to his mind of putting his company's tyres upon the market as "Warwick tyres" he was disinclined to do so at first for several reasons, and one of those reasons was that he feared that the bad reputation of the Warwick tyres, being what he calls second grade tyres, would interfere with the sale of his own motor tyres, and stronger corroboration of the case made by the plaintiffs that the sale of motor tyres as Warwick tyres would lead to confusion could not be desired. The point that I have to decide is whether the use of this trade name of "Warwick" in connection with the sale of motor tyres would be calculated to mislead members of the trade and public into the belief that the tyres they were acquiring were tyres of the same make as the well-known Warwick tyres which were on the market. Some of them, no doubt, might have known that hitherto the name of "Warwick" had been applied only to cycle and motor cycle tyres, and others might not have known. In either event I think the inference is that, having regard to the name "Warwick" upon the market, a motor tyre introduced as a Warwick motor tyre would lead to the supposition that the persons who were dealing with it were the same persons as those who had for many years past been dealing with the Warwick cycle tyre.

An argument was advanced on behalf of the defendants, which I confess surprised me, that you cannot succeed in a passing-off case unless the articles which are put upon the market by the defendants are identical with the articles which are dealt with by the plaintiffs, and it is said that this must be so because the action of passing off is an action which depends upon damage, and in the absence of proof of damage the plaintiffs have no right to succeed. It is also said that since the plaintiffs are not

dealing in the article which the defendants are putting upon the market in their name there can be no damage for the loss of the sale of the goods, and therefore this action will not lie. Now I do not think that that argument is tenable. It seems to me that the question is, Are the defendants putting their goods upon the market in such a way as to lead to the supposition that they are the goods of the plaintiffs? If so I think the plaintiffs are entitled to an injunction restraining the defendants from so acting. Moreover, it is not a case here in which no damage can be said to arise to the plaintiffs. Far from it. As I understand it, practically the sole asset possessed by the plaintiffs is the goodwill which attaches to the name "Warwick" in the tyre market, and I think the evidence shews that that goodwill is an asset of great value. Certainly they derive a very substantial profit from it. I should have thought it could not be doubted that the value of the trade name "Warwick" in the tyre market would be considerably lessened by the fact that there was another person in the market who was entitled to deal in tyres in connection with the name "Warwick." In the first place, it would limit the right of the owner of the name "Warwick" in the tyre market to the use of his name in respect of those articles—only those actual articles—which he had dealt in hitherto; and, in the second place, it puts the reputation of the plaintiffs in the hands of persons over whom they have no control whatever. What I say of course I say throughout upon the finding that the use of the word "Warwick" in connection with motor tyres would lead to the belief that these motor tyres were of the same make as the cycle and motor cycle tyres which were already on the market under the name of "Warwick." It seems to me, therefore, if damage be necessary, there is inferential damage in the present case, but I doubt whether any damage is necessary at all. There has been in the past a somewhat barren discussion as to whether a trade name or trade mark is property. I do not think that, however the decisions may stand at the present moment, it is very material, but, if I had to express my own opinion upon it, I should say that there is a special property in a trade name. That there is a universal property in a trade name certainly is not true, because if the

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plaintiff has a trade name in the tyre trade he cannot stop anybody else using the same name for the sale of some article which has no connection with the articles in respect of which the plaintiff has acquired a reputation to the name. Whether you call it a special property or whether you call it a right, I think a plaintiff has a right to ask the Court for an injunction where he establishes that a particular name has by reputation been applied to the goods which belong to him, if other persons use that name in such a way as to lead to the supposition that their goods are his goods.

Now to deal with the position of the Warwick Tyre Company. The Warwick Tyre Company, the plaintiffs, do not themselves either manufacture or sell, but by an agreement in 1905 they transferred the right to carry on their business to another firm, the Dunlop Pneumatic Tyre Company, upon certain terms to their advantage, which it is unnecessary to discuss, and it is said that, that being so, they are not the right persons to sue. I do not think that that is so. In the first place, it seems to me that the right to sue does not depend upon the reputation being identified with an individual manufacturer or merchant. An article under a trade name may have a wide reputation in the market, and the majority of the people who acquire or desire to get that article may not have the faintest notion to whom it belongs. The question is, Has the name got a reputation which leads people to acquire goods under that name? If it has, then the person who really is entitled to the name is, I think, the person who is entitled to sue. Now here, of course, if the Warwick Tyre Company had parted finally with their rights in the name, they could not sue; but they have not done so. They have given another company certain rights for a particular time, the right to be determined after the lapse of a certain number of years. Subject to another company having the right to manufacture and sell the goods for them, the right to the trade name appears to me to remain vested in the plaintiff company, and I think they and, as it seems to me at present, they alone can sue for the protection of their trade name. I think, therefore, the plaintiffs are right in their contention, and that an injunction must be granted against the defendants with costs.

NOTE.—The material part of the judgment as finally passed and entered was:

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This action coming on for trial, &c. This Court doth order that the defendants their directors servants and agents be restrained from selling or offering for sale motor tyres as "Warwick" tyres or using the word "Warwick" in connection with the sale or offering for sale of motor tyres in such a way as to lead to the belief that the defendants' motor tyres are motor tyres of the plaintiff company. And it is ordered that the defendants do deliver up to the plaintiffs all advertisements and tyres in their possession or power which are in contravention of this injunction or delete therefrom any statement which offends against this injunction.

Solicitors: *J. B. & F. Purchase; A. P. W. Hunt.*

H. L. F.

SLAZENGER & SONS *v.* SPALDING & BROTHERS.

NEVILLE J.
1909
Dec. 9.

[1909 S. 982.]

Trade Mark—Registered Mark — Innocent Infringer—Injunction—Whether Plaintiff also entitled to Compensation—Practice—Register of Trade Marks —Notice—Trade Marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *s.* 3—*Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 7, 39.

When a registered trade mark is innocently infringed the proprietor of the trade mark is entitled to an injunction against the offender, but not to an account of profits or an inquiry as to damages unless the offender continues to infringe after notice of the proprietor's right.

The principle of *Edelsten* v. *Edelsten*, (1863) 1 D. J. & S. 185, applied.

The register of trade marks does not operate as notice to the public of the existence of a registered mark.

ACTION.

The plaintiffs were manufacturers and vendors of all articles used in games and sports, including golf balls, and were the registered proprietors of two associated trade marks under the Trade Marks Act, 1905. Both of these marks were registered in class 49 and were respectively a Maltese cross, registered for golf balls only, and a plain cross with arms of equal length, registered for golf balls and golf clubs. The marks were registered in May and June, 1907, respectively.

Early in March, 1909, the plaintiffs discovered that the defendants, who were also manufacturers and vendors of golf balls, were infringing their said trade marks by selling golf balls marked with a black cross under the name of "Black Cross" or

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"Cross" balls, and on March 22 they served the defendants with the writ in this action, claiming (1.) an injunction to restrain the defendants from infringing their said trade marks, and (2.) the usual consequential relief; and with the writ they served a notice of motion for an interim injunction.

On March 25 the defendants, who had no knowledge of the plaintiffs' trade marks, and were innocent infringers, offered to submit to a perpetual injunction in the terms of the notice of motion, and took steps to remove the black cross from all golf balls in stock and to obliterate the reference to black cross balls in their catalogues. The plaintiffs, however, insisted that they were also entitled to an account of the defendants' sales of black cross golf balls so that they might satisfy themselves as to the damages to which they were entitled. On March 26 the defendants declined to submit to an account, but offered without prejudice to pay 10*l.* by way of nominal damages. On March 31 the plaintiffs refused to accept 10*l.* as nominal damages, and the next day, April 1, moved for an interim injunction, when, on the defendants giving an undertaking in the terms of the notice of motion, no order was made, except that the costs of the motion should be costs in the action.

The action now came on for trial. The defendants in their defence adhered to the offers they had made in the previous March, and the only question was whether the plaintiffs were also entitled, at their option, to an account of profits or an inquiry as to damages.

Jenkins, K.C., and *Fischer Williams*, for the plaintiffs. The defendants did not offer us all that we are entitled to. The offer of 10*l.* as nominal damages was insufficient, and it was not paid into Court. The defendants were not entitled to refuse inspection of their books. An account follows an injunction as a matter of course: *Lever* v. *Goodwin* (1); and we are entitled to an account of profits or an inquiry as to damages, at our option. Want of knowledge does not affect the right to an account or damages in the case of a registered trade mark. Under s. 39 of the Act of 1905 we have the right to the exclusive use of the

(1) (1887) 36 Ch. D. 1.

registered mark. Such a right is a monopoly in the nature of a franchise and was first conferred by the Trade Marks Registration Act, 1875, s. 3, and has been continued in all the subsequent Trade Marks Acts, and entitles the proprietor of the registered mark to damages when his statutory right is invaded. Prior to the Trade Marks Registration Act, 1875, there was some authority for saying that, in the case of a common law right to a trade mark, an innocent infringer was not made to account for profits, but that principle does not apply, it is submitted, to a registered trade mark and the statutory rights that go with it. Further, under s. 7 of the Act of 1905 the existence of the public register of trade marks is notice or reasonable means of notice and is intended to be notice of a registered mark having regard to all the precautions the registrar takes before registration is allowed.

Walter, K.C., and *Colefax*, for the defendants. Prior to the Act of 1875 an account of profits was not granted against an innocent infringer of a trade mark—*Edelsten* v. *Edelsten* (1); *Moet* v. *Couston* (2)—and it is submitted that the same practice has continued under the Trade Marks Acts.

[NEVILLE J. Does not an action for damages lie for breach of the statutory right?]

We submit not, unless knowledge is proved. There is nothing in the Trade Marks Acts which abrogates the old rule established by *Edelsten* v. *Edelsten* (1) and which is stated in the text-books to be the practice: Kerly on Trade Marks, 3rd ed., p. 455. *Montgomerie & Co.* v. *Young Brothers* (3) supports this view, and s. 7 of the Patents Act, 1907, now establishes the same rule with respect to patents.

[NEVILLE J. referred to *Saxlehner* v. *Apollinaris Co.* (4)]

That was a case of fraud, and is founded on *Lever* v. *Goodwin*. (5) There is no reported case under the Trade Marks Acts, but in an unreported case of *Ellen* v. *Slack*, noted in the *Solicitors' Journal* (6), which appears to have been an action by the proprietor of a trade mark registered under the Act of 1875 against an innocent infringer, Jessel M.R. granted an injunction,

(1) 1 D. J. & S. 185, 199.
(2) (1864) 33 Beav. 578.
(3) (1904) 21 Rep. Pat. Cas. 285.
(4) [1897] 1 Ch. 893, 903, 904.
(5) 36 Ch. D. 1.
(6) (1880) 24 Sol. J. 290.

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but refused to order an account of profits. Here the plaintiffs, if entitled to anything, are only entitled to nominal damages and were offered 10*l.* Lastly, the register is not notice. Sect. 7 only provides that it shall be open to inspection by the public on payment of the prescribed fee.

Jenkins, K.C., in reply. In *Ellen* v. *Slack* (1) and *Moet* v. *Couston* (2) the defendant who was attacked had not himself stamped the goods, but had bought stamped goods, and in *Cartier* v. *Carlile* (3), which was before 1875 and was not cited in *Edelsten* v. *Edelsten* (4), an account of profits was directed. We are absolutely entitled to an injunction which is based on the breach of our statutory right and not on any equitable principles, and it is submitted that the practice before 1875 does not affect our right to damages for the breach of our statutory right. In *Mansell* v. *Valley Printing Co.* (5) the infringer of the common law right of property in an unpublished picture was held liable in damages.

NEVILLE J. I cannot help feeling sorry that this case has been brought on for trial because, when the complaint of the infringement of the trade mark was made, I think the defendants immediately met the plaintiffs in a satisfactory manner. However, the matter has been brought on upon a point which, no doubt, is not without interest. Putting it shortly, it is this: Does the principle of *Edelsten* v. *Edelsten* (4) apply since the passing of the Trade Marks Act, 1875, which put into a statutory form, with some alterations and additions, the rights which had been previously enforced in equity with regard to a trade name or trade mark acquired by user? Now *Edelsten* v. *Edelsten* (4) seems to have survived as an authority in text-books; and certainly in Seton on Judgments, 6th ed., p. 633, it is still cited as an authority upon the form of order. The precise point appears to have been considered by the late Sir George Jessel M.R. in the year 1880, although, unfortunately, there is but a short note of the case in the *Solicitors' Journal* (1), but I think that note is

(1) 24 Sol. J. 290.
(2) 33 Beav. 578.
(3) (1862) 31 Beav. 292.
(4) 1 D. J. & S. 185.
(5) [1908] 2 Ch. 441.

quite conclusive upon the point. It is the case of an action brought upon a registered trade mark, and the question submitted to his Lordship there was whether in the case of an innocent infringement, where a perpetual injunction was granted, a right to an account of profits went with it. I think that nowadays, where the right to compensation exists, there is no distinction between an account of profits and an inquiry as to damages, and that it rests with the plaintiff to elect whether he will take one form of relief or the other. But the question here is whether, as against an innocent infringer, any right to compensation exists. If *Edelsten* v. *Edelsten* (1) applies, it does not. Having regard to the decision of Sir George Jessel M.R. in *Ellen* v. *Slack* (2), and what seems to have been the practice up to the present time, I think *Edelsten* v. *Edelsten* (1) is still applicable, and that in a case where the infringement of a trade mark is made without the knowledge of the existence of the plaintiffs' rights there is not a right to compensation, but only a right to an injunction. In this case I am satisfied that the defendants did not know of the plaintiffs' rights; and I do not think it can be held in the absence of express statutory provision to that effect that the trade marks register is notice to all the world. I am of opinion, therefore, that the plaintiffs were wrong in proceeding with their action after the offer made to them by the defendants of an injunction with costs up to that date and 10*l.* as nominal damages. No point is, very properly, made about the right to delivery up of the infringing articles, because the plaintiffs are satisfied with what has been done or undertaken to be done by the defendants. I have only to consider whether the plaintiffs are right in insisting that they are entitled to compensation either in the form of an inquiry as to damages or an account of profits. I think that they are not, and therefore the costs of the action, after the date of offer, must be the defendants', the costs up to that date being the plaintiffs', with the usual set-off.

Solicitors: *Baker, Blaker & Co.; Lawrance, Webster & Co.*

(1) 1 D. J. & S. 185. (2) 24 Sol. J. 290.

H. L. F.

NEVILLE J. COURAGE & CO., LIMITED *v.* CARPENTER.

1909

Dec. 15, 16, 17. [1909 C. 1994.]

Landlord and Tenant—Brewer's Lease—Tied House—Lessee's Covenant to buy Malt Liquors from Lessor—Rise in Prices—Breach of Covenant—Fair and reasonable Prices—Current Market Prices—Injunction—Form of Order.

A tenant's covenant in a brewer's lease of a tied house not to sell on the demised premises any malt liquors other than such as shall have been purchased from the landlord imports an implied covenant by the landlord to supply malt liquors of good quality and at fair and reasonable prices.

Such a tenant's covenant was contained in the plaintiffs' lease of one of their tied houses in the London metropolitan area, and the defendant was the assignee of the lease. In June, 1909, in consequence of the increased licence duties proposed in the Finance Bill of that year, the plaintiffs and substantially all the London brewers (except a few small brewers) agreed to raise the price of beers 6*s.* a barrel to the trade, leaving the trade to recoup themselves by raising the retail price to the public one farthing per half-pint. The increased prices were agreed to by the trade generally, but the defendant refused to pay them and purchased his malt liquors elsewhere at the old prices. In an action by the plaintiffs to restrain the defendant from committing a breach of his covenant:—

Held, that under the circumstances the increased prices were fair and reasonable, and that the plaintiffs were entitled to an injunction.

Form of order in *Catt* v. *Tourle*, (1869) L. R. 4 Ch. 654, as stated in Seton on Judgments, 6th ed., vol. i. p. 534, not followed.

Quære as to the meaning to be attributed to the words "current market prices" in a landlord's covenant in such a lease.

ACTION.

The plaintiffs were the owners of a public-house, known as the Rose of Kent, at Deptford, and by deed dated August 25, 1897, granted a lease of it to the defendant's predecessor in title for forty years from December 25, 1896, at the yearly rent of 60*l.*, payable quarterly, and subject to the covenants therein contained. By the deed the lessee covenanted for himself and his assigns with the plaintiffs (inter alia) that the lessee, his executors, administrators, or assigns, would throughout the said term, so long as the necessary licences could be obtained for the purpose, use the public-house thereby demised as a licensed victualling house only, and would at all proper times during the said term apply

for and endeavour to procure a renewal of the necessary licences for using and keeping the said public-house open as and for a public-house and tavern for the sale of beer, wine, and exciseable liquors by retail; and also would not during the said term buy, receive, sell, or dispose of, either directly or indirectly, or permit to be bought, received, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said premises, or any part thereof, any beer, ale, porter, stout, or any other malt liquors whatever other than such as should have been bona fide purchased by the lessee, his executors, administrators, or assigns, of the plaintiffs or their successors in business.

In December, 1905, this lease of the Rose of Kent was assigned to the defendant for the residue of the term thereby granted, and at the same time he demised the same premises to the plaintiffs for the residue of the said term less one day, and also assigned to them the goodwill of the business carried on by him thereat, together with all the necessary licences, by way of mortgage to secure the repayment with interest of the sum of 3000*l.* then advanced by them to him; and the mortgage deed contained a covenant by the defendant with the plaintiffs that he would not use or sell, or permit to be used or sold, in or upon the premises demised by the mortgage any ale, beer, porter or stout, or other malt liquors, but such as should be supplied by the plaintiffs.

On June 23, 1909, the principal brewers and brewery companies trading in London, in consequence of the increased licence duties proposed by the Budget, agreed with one another that the price of all malt liquors sold within the Metropolitan Police area by them or any of them should as from July 1, 1909, be raised 6*s.* a barrel, and that no malt liquors should be sold by any of the said brewers and breweries at any lower price. A few of the small breweries did not join this combine.

On June 24, 1909, the plaintiffs (who owned some 300 houses in the metropolitan area) sent a circular notice as well to the tenants of its tied houses (including the defendant) as to its free customers informing them that the new financial burdens which were to be imposed upon them by the Budget were such that they could no longer continue to supply beers on the terms that

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had existed hitherto, and that on and after July 1, 1909, their prices would be increased by 6*s.* a barrel. The defendant refused to pay the increased prices and commenced to purchase malt liquors at the old prices from a brewery that had not joined the combine. Thereupon the plaintiffs commenced this action in July, 1909, and claimed an injunction to restrain the defendant from buying malt liquors other than such as should have been purchased from themselves in accordance with the said covenants to that effect in the lease and mortgage.

The defendant alleged by his defence that it was an implied term of the said covenants in the lease and mortgage that the plaintiffs should supply him with malt liquors at a fair price and without making an unreasonable profit; that by raising his prices the plaintiffs were endeavouring to cast upon him the burden of completely bearing the extra licence duties proposed to be imposed by the Finance Bill, 1909; that if the Bill passed the plaintiff would be precluded by clause 32 of the Bill from charging him with the increased prices; that the increased prices were out of all proportion to the new financial burdens referred to in the plaintiffs' letter; that the increased prices were unfair, oppressive, and in excess of the prices charged in the general course of the trade, and that by charging such prices the plaintiffs made an unreasonable profit; that the result of payment by him of the increased prices would compel him to increase his retail prices, and he would thereby lose all or most of his old customers, who would refuse to pay an increased price for their malt liquors and would obtain them from other public-houses in his neighbourhood at the old prices; and that under the circumstances he was released from the obligations of the said covenants in the lease and mortgage.

The action now came on for trial.

The evidence given on behalf of the plaintiffs by Mr. Cecil Lubbock, the managing director of Whitbread & Co. (who owned 600 tied houses in the metropolitan area), and by Mr. Harding, the plaintiffs' manager, was to this effect. There were now some 6450 licensed premises in the metropolitan area, of which over 90 per cent. were tied houses. In 1880 the malt tax was

repealed and a duty on beer of 6*s.* 3*d.* a barrel was imposed. This duty had been increased from time to time, and at the commencement of 1909 stood at about 8*s.* 3*d.* a barrel, and these duties had as a rule been paid by the brewers without raising the price of beers to the trade. But the great increase in licence duties proposed in the Budget and in the Finance Bill of 1909 would, if imposed, exceed the sum divided in the preceding year by London brewery companies among their ordinary shareholders. The London companies therefore, in order to protect their shareholders and to recoup themselves the increased duties they would have to pay if the Finance Bill were passed, held meetings and appointed a committee to consider the question of a rise in the price of beers to meet the increased duties proposed by the Bill. This committee devised the scheme of raising the price of beers 6*s.* a barrel to the trade, who should recoup themselves by raising the retail prices to the public by one farthing the half-pint; and this retail price would amount to 12*s.* a barrel and would be equally divided between the brewers and the trade. This increased price of 6*s.* a barrel was directed solely to protect the shareholders of the brewery companies and did not give an increased profit to the companies. It was calculated so as to recoup the brewers the increased duties they would have to pay and to cover the loss in profits (which happened) that would ensue owing to the decrease in trade that would result from the increased prices charged to the public. The scheme was agreed to by all the London brewers, with the exception of a few small brewers, and was assented to by the trade generally, and the rise in prices took effect as from July 1. The defendant was the only tenant of the plaintiffs who refused to pay the increased prices. Another of their tenants did object, but he paid. In the following November, after Lord Lansdowne gave notice of his resolution with regard to the Finance Bill, the brewery companies lowered their prices to the trade to the old rates.

Jenkins, K.C., and *Sheldon*, for the plaintiffs. The real issue is whether the plaintiffs are willing to fulfil their obligation to supply beers of good quality and at fair and reasonable prices.

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There is no dispute as to the quality, and there was no dispute as to prices until the Budget was introduced. The defendant's covenant to purchase beers only of the plaintiffs is not void for want of mutuality because the plaintiffs do not expressly covenant to provide beers, and the Court will interfere by injunction to restrain the defendant from acting in contravention of his covenant: *Catt* v. *Tourle*. (1) The form of the injunction in that case is given in Seton on Judgments, 6th ed., vol. i. p. 534.

[NEVILLE J. I do not think that the form of the order there applies to this case. I do not understand how the words "at market or fair and reasonable prices" got into the order. They do not occur anywhere in the report of the case. It seems to me that all I have to consider here is whether the prices charged were fair and reasonable.]

We rely on an unreported case of *Noakes & Co., Ld.* v. *Day*. (2) There the tenant's covenant was the same as in the present case, and the plaintiffs raised the price of beer 1*s*. a barrel, which was the amount of the Boer war tax, and the Court of Appeal held that the increased price was fair and reasonable. The case was argued on the footing that there was an implied covenant by the plaintiffs to supply beer of good quality and at fair and reasonable prices, and we are content to argue the present case on the same footing. In *Arnold Perrett & Co., Ld.* v. *Radford* (3) the tenant covenanted to buy malt liquors from the landlord at "fair current market prices," and Wright J. held that those words meant a price that was fair and current in the case of tied houses, and that the price did not cease to be fair and current because the tenants of free houses who were exceptionally circumstanced obtained lower prices by special bargain. Here over 90 per cent. of the licensed houses in London are tied houses and the market is the tied house market, and on the plaintiffs' evidence the increase of 6*s*. a barrel was fair and reasonable.

Hemmerde, K.C., and *Cozens-Hardy*, for the defendant. We rely on the judgment of Wright J. in *Arnold Perrett & Co., Ld.* v. *Radford* (3), where he says "the landlord would not establish

(1) L. R. 4 Ch. 654, 658, 659.
(2) See note at end of case, post, p. 270.
(3) (1901) 17 Times L. R. 301.

his case merely by shewing that his charges were the same as those of other brewers, if it appeared that the brewers generally were maintaining an excessive scale of prices." Here the prices charged were unreasonable and in excess of those charged in the reasonable course of trade, and left the defendant no fair margin of profit because he could not raise the retail price to the public in consequence of the competition in his neighbourhood. *Noakes & Co., Ld.* v. *Day* (1) is distinguishable. It only decides that it was not unreasonable to add a war tax of 1*s.* to the price. But that is not this case at all. Here it is unreasonable for the brewers to put an increased price of 6*s.* on their tenants in anticipation of a tax that has not become law. Moreover, the Legislature in the Finance Bill is not attacking the manufacturers of beer, but the monopoly value of the tied houses. It is that monopoly value that the brewers are seeking to throw on the public, and clause 32 of the Finance Bill is directed to prevent that being done. It is wrong for the brewers to throw a burden, intended by the Legislature for themselves, upon their tenants and the public and to call it a fair and reasonable price. Such a charge was never in contemplation of the parties when the lease was made. It is also an excessive scale of prices, because it is in excess of those charged in the ordinary course of the trade and which could be obtained from the brewers who did not join the combine.

No reply was called for.

NEVILLE J. I think the only question that I have to decide here is whether the plaintiffs have fulfilled the obligation upon their part so as to enable them to insist upon the defendant fulfilling the covenant entered into by him to take all his beers from them. That resolves itself into the question of whether the additional prices demanded from the defendant were reasonable prices. Some point was made as to whether the plaintiffs had not put it out of their power to supply beers to the defendant except on terms which they were not justified in imposing. I think that the evidence does not amount to that. Although Mr. Harding spoke of not being in a position to supply

(1) See note at end of case, post, p. 270.

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beer except on the terms of the tenants raising the prices, he referred to the agreement between the brewers, with which, of course, the defendant has nothing to do, and he treated it as a matter of honour. And, further than that, as a matter of fact, beer has been supplied without any conditions being insisted on of that kind. So that I think what I have to see is whether the prices were reasonable. It seems to me that I cannot hold that the prices adopted practically by the whole of the London brewers, and assented to by practically the whole of the licensed victuallers trading in London, are unreasonable prices. There is no doubt that a heavy increase to the burdens upon the trade was anticipated under the Budget, and I do not think that the trade could be accused of acting hastily because they acted upon the assumption that the Finance Bill brought in by the Government would become law in the course of the current year. It was with a view to those increased burdens that the increase of price was made.

First of all, it is said that they were not entitled to shift the burden upon the shoulders of the public which was intended by the Government to be borne by themselves. With that I have nothing to do. Taxes are often levied with a view of the payment coming out of the pocket of one class when, as a matter of fact, it turns out ultimately that it comes out of the pockets of another class; and there is nothing in the law of this country, as I understand it, which makes it improper for a man to shift the burden of taxation upon the shoulders of others if he can do so without infringing the law. It seems to me, therefore, that I cannot say that the brewers were not entitled, if they could, to so raise the price of their beers as to cover the increased burden which was contemplated by the Bill. Then another question arises as to whether the increase in price which they made of 6*s.* a barrel was so excessive as to make the prices charged for the beer unreasonable. Again I say that, having regard to the fact that it was practically adopted by the whole trade, I think it is impossible to say that it was unreasonable. And there is this also to be considered, which I think is of importance, that they thought it would be most in their interests—and I think they are entitled to consult their interests—to raise the price to the

consumer, and it is difficult to see how that price could be raised except in terms of some coin of the realm. The raising of the price was in the terms of the smallest coin of the realm —a farthing. If they were going to raise their prices at all to the public, it is very difficult to see how they could be raised to any less degree. I do not see upon the evidence that there is any indication that the result of this operation will be to materially increase the profits of the brewers. They contemplated a reduction in the total of their trade, and, so far as experience has gone, that reduction has followed very much to the extent which they anticipated; but I do not think anybody can say at the present moment how far it would have shrunk had the increased prices been maintained. At present those prices have been reduced, and we have only to deal with what took place in the past. I come to the conclusion that there was nothing unreasonable in the charges made by the plaintiffs to the defendant; and, consequently, that they are entitled to an injunction with costs. I wish to say one thing before I leave the case, and that is this. First of all, I do not think that the decree in *Catt* v. *Tourle* (1), which has been referred to in Seton on Judgments, 6th ed. vol. i. p. 534, can be taken as the common form decree in cases of this kind. I think the injunction in the present case must be granted so long as the plaintiffs are prepared to supply beers of reasonable quality at a reasonable price. I do not think it is a subject for an undertaking, because in *Catt* v. *Tourle* (1) the plaintiffs were willing to give such an undertaking. And further, I wish to reserve any expression of opinion on the question of whether, where there is a positive covenant on the part of the landlord to supply beers at "current market prices," he would be entitled to charge an extra price to a tenant of a tied house, merely because that house was tied. It seems to me that that question requires to be very carefully considered. There will be an injunction, following the terms of the lease, and also following the terms of the mortgage, so long as the plaintiffs are ready and willing to supply the defendant with malt liquors—specifying them—of reasonably good quality and at reasonable prices, and the costs of the action.

(1) L. R. 4 Ch. 654.

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NOTE.—The material part of the order as finally passed was as follows:—

This action coming on, &c. This Court doth order that the defendant G. H. Carpenter his servants and agents be restrained for the term of forty years from December 25, 1896, the term of the lease dated August 25, 1897, in the statement of claim mentioned, or during so much of that period as the plaintiffs are ready and willing to supply all beer ale porter stout or other malt liquors of reasonable quality and at reasonable prices to the defendant, from buying receiving selling or disposing of either directly or indirectly or permitting to be bought received sold or disposed of either directly or indirectly in upon out of or about the premises demised by the said lease or any part thereof any beer ale stout porter or any other malt liquors whatsoever other than such as should have been bona fide purchased by the defendant his executors administrators or assigns of the plaintiff company or their successors or successor in business contrary to or in breach of the covenant contained in the said lease.

Solicitors: *Bayley, Adams, Hawker & Noble; Waltons & Co.*

H. L. F.

Note.

C. A. 1907

March 26.

NOAKES & CO., LIMITED *v.* DAY.

[1905 N. 1060.]

The plaintiffs were brewers and the lessors of a public-house known as the Hollydale Tavern at Peckham. The defendant was a licensed victualler, and the assignee of two leases of the same premises granted by the plaintiffs. The leases contained covenants by the lessees for themselves, their heirs, executors, administrators and assigns, that they would not during the term of the leases buy, receive, sell, or dispose of either directly or indirectly, or permit to be bought, received, sold, or disposed of either directly or indirectly, in or upon, out of, or about the said premises, or any part thereof, any porter, stout, beer, and ale other than such as should have been bona fide purchased of the lessors or of their successors in business.

Early in 1900, in consequence of the Boer war, an extra duty of 1*s.* a barrel (called the war tax) was imposed on beer. The principal London brewers met and agreed to put this extra 1*s.* a barrel on their customers, and in March, 1900, the plaintiffs sent a circular letter to all the tenants (including the defendant) of their tied houses in which they said: "You are doubtless aware that Her Majesty's Government have imposed a war tax on beer of 1*s.* a barrel, and we are consequently compelled to add this amount to the price of all our beer." For some time the plaintiffs supplied and the defendant paid for the beer at the increased price, but subsequently he refused to pay the extra 1*s.* a barrel, and in July, 1905, the plaintiffs sued him on a specially indorsed writ for 264*l.* 0*s.* 2*d.*, being the amount due from him for malt liquors supplied by them to him at the increased price.

By his defence the defendant admitted that the goods mentioned in the claim were sold and delivered by the plaintiffs to him in pursuance of the said covenant, and alleged that it was an implied term of the covenant that the plaintiffs would supply such porter, stout, beer, and ale as the defendant might buy or purchase from them at the fair market prices of the day, and that the prices claimed were not the fair market prices of the day for the said goods. Alternatively, he alleged that the prices claimed were unreasonable, unfair, and excessive.

The action came on for trial without a jury before Bray J. on April 28, 1906, when judgment was given for the plaintiffs. The defendant appealed.

The appeal was heard on March 26, 1907.

Montague Lush, *K.C.*, and *W. O. Hodges*, for the appellant.
English Harrison, *K.C.*, and *Hansell*, for the respondents.

COZENS-HARDY M.R. I think the view taken by the learned judge in this case was quite correct. The defendant Day is the occupier of a tied house. The tie is in the usual form with one exception, the tenant is bound —I am not giving the words, but merely the substance—to keep the house as a licensed house, and is to do what he can to promote trade. That, of course, presupposes the necessity of securing for the house malt liquors, and then comes what is known as the tie. It is a covenant that no beer shall be consumed at the house except that which is bought from the plaintiffs, Messrs. Noakes & Co., Limited. There is no express provision by Noakes & Co., Limited, binding them to supply beer, still less is there any provision fixing the price at which beer is to be purchased, but Mr. English Harrison has argued the case with great fairness and in a manner which, whether it is right or wrong in point of law, is at least as favourable to the defendant as it can possibly be put. He assumes that there is an implied covenant by Messrs. Noakes & Co., Limited, that they will on the request of the defendant supply him with beer of drinkable and reasonable quality and at a reasonable price. Now I am clear that that implied covenant is not one which binds them to supply beer at the lowest possible market price. It must be at a reasonable price, and when we have evidence here that the price of beer at the date of the granting of the lease was 36*s.* a barrel, and that at the date when Day became assignee of the lease it was 33*s.* a barrel, and that subsequently the cost to the brewer was increased by the extra war tax of 1*s.* a barrel, it seems impossible to say that the charge of 34*s.* a barrel was not a reasonable charge. I should have come to that conclusion apart from any evidence, but when we find from the evidence given on behalf of the plaintiffs by the representatives of two breweries, one of them certainly a very large brewery, it is plain that the course taken by Messrs. Noakes & Co., Limited, is not a peculiar individual course taken by them in distinction from all other breweries, but is one which other breweries in a large way of business have thought themselves justified in taking. The New Westminster Brewery Company, all of whose houses are tied, have done exactly that which Messrs. Noakes & Co., Limited, did. The Cannon Brewery, which is a very large brewery, have done the same thing. Their houses are mostly tied houses,

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but with a certain proportion of free houses, that is to say, houses as to which there is no tie. It is said by Mr. Lush, "Oh yes, there are many houses in the full sense of the word free, but they are not free houses because they have obtained a loan from the brewers." In my opinion that is not really important to any point we have to decide here, and I see no ground for holding that there has been anything but a reasonable price charged for the beer. The appeal is dismissed with costs.

VAUGHAN WILLIAMS and BUCKLEY L.JJ. concurred.

Solicitor for appellant: *R. W. Beckwith.*
Solicitors for respondents: *Knapp-Fisher & Sons.*

H. L. F.

PARKER J. 1909 *Nov.* 26.

In re SMALLWOOD. GOTHARD *v.* CHAPMAN.

[1909 S. 734.]

Settlement—Trust for Benefit of National School—Gift over on School Board or Representative Body under the Education Acts being formed for the Parish —Education Act, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 7, 13.

In 1892 funds were vested in trustees to be invested by them, and the income to be paid to the trustees of the National Schools at Alcester, for the purposes of education at such schools, and the carrying on of the same "until a school board or other representative body under the Education Acts shall be formed for the parish of Alcester," in which event the funds were to go to increase the endowment fund of certain almshouses. On the coming into operation of the Education Act, 1902, further payment of the income was stopped, as doubts were entertained whether the effect was to cause an event to take place on the happening of which the gift over was to take effect:—

Held that, as the Education Act, 1902, had abolished school boards and all representative educational bodies elected or constituted for educational purposes, and had transferred all the powers which would have resided in an elected body under the Education Acts to the existing county authorities, and made them the educational authorities within their areas, no school board or other representative body under the Education Acts had been formed for the parish of Alcester, that the gift over had not taken effect, and that the income was payable to the managers of the schools.

WILLIAM SMALLWOOD was the brother and sole next of kin of Edwin Smallwood, who died in 1892, and was entitled under the

will of the latter to his residuary estate, which was given to trustees upon such trusts as the testator might thereafter declare, and in default thereof to his next of kin. The testator died without having declared any trusts as to his residuary estate.

By a request in writing, dated August 17, 1892, William Smallwood authorized the trustees of the will to pay out of the residue the sum of 2000*l.* to the trustees of Brooke Bridges Charity at Alcester, but to be treated separately from that charity, to be expended in building, endowing, or otherwise in relation to new almshouses for the benefit of poor people residing in Alcester as the trustees might think fit, with liberty for them to declare the trusts upon which the same should be held, but so that no portion of the same should be laid out in the purchase of land.

By another request, dated August 27, 1892, William Smallwood authorized the trustees of the will to pay to certain persons the further sum of 2000*l.* out of the residue, to be invested by the payees as they should think fit for endowing the same almshouses, and directed that with the consent of the payees of the first 2000*l.* that sum should be paid to the payees of the second 2000*l.* By the same request William Smallwood authorized the trustees of the will to pay out of the residue to the payees of the second 2000*l.* a further sum of 1000*l.* "to be invested by them and the income paid to the trustees of the National Schools at Alcester for the purposes of education at such schools and the carrying on of the same until a school board or other representative body under the Education Acts shall be formed for the parish of Alcester or the said National Schools shall otherwise cease to be carried on for the purposes of education, and afterwards the said sum of 1000*l.* shall be devoted as a further endowment fund for the benefit of the almshouses at Alcester established by me."

With the consent of the payees of the first 2000*l.* all the three sums were paid by the trustees of the will to the payees of the second 2000*l.*

Out of the moneys received by them these payees purchased a piece of land and erected thereon the almshouses.

By a deed dated January 23, 1895, additional trustees were

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appointed of the almshouses and land, and of the two sums of 2000*l.* each (or so much thereof as remained after paying the costs of erecting the almshouses), and of the sum of 1000*l.*, subject to the trusts in respect thereof declared by William Smallwood in favour of the National Schools and by the request of August 27, 1892, and this deed contained a number of provisions as to regulating the almshouses and the funds above mentioned.

The 1000*l.* was invested on a mortgage and in certain debentures, and the income was paid to the trustees of the National Schools at Alcester until March 26, 1903, the date when the Education Act, 1902, came into operation.

The trustees of the almshouses and of the funds thereof thought that a representative body under the Education Acts, within the meaning of that expression in the request of August 27, 1892, had been formed for the parish of Alcester, and they accordingly withheld any further payment of the income to the trustees or managers of the National Schools.

The trustees accordingly took out an originating summons for the determination of the question whether, as trustees of the declaration of trust or request, they ought, according to the true construction thereof, to hold the moneys, funds, and securities representing the 1000*l.*, and the income accrued in respect thereof, upon trust for the public elementary school now carried on under the provisions of the Education Act, 1902, or whether, according to the true construction of the declaration of trust or request and in the events which had happened, the said moneys, funds, securities, and income ought to be devoted as a further endowment fund for the benefit of the almshouses at Alcester established by William Smallwood.

The defendants to the summons were the managers of the school, the Attorney-General, and the Warwickshire County Council.

Method, for the plaintiffs. The question raised by the summons is whether a school board or other representative body, within the meaning of the request of August 27, 1892, has been formed for the parish of Alcester. The plaintiffs

submit that, as under the Education Act, 1902, a local education authority has been formed for the county of Warwick, and that authority must be either a school board or some other representative body, and as the county includes Alcester, one of the events has happened which the donor contemplated. The school is now supported by the rates, and the only moneys which the managers of it have to provide are those which are required for structural repairs and alterations. As the county council is the education authority for the district in which Alcester is situate, it is the school board of a united school district under s. 40 of the Elementary Education Act, 1870. The education authority is stated in the First Schedule to that Act, and is always the school board. If the opposite view is taken, the money will be applied in relief of the education rate or poor rate, and the donor never intended that it should be so applied. [He cited *In re Beard's Trusts* (1); *In re Blunt's Trusts*. (2)]

H. St. John Field, for the Warwickshire County Council.

Sargant, for the Attorney-General. By s. 13 of the Education Act, 1902, nothing in that Act is to affect any endowment, and where under the trusts or provisions affecting any endowment the income must be applied in whole or in part for those purposes of a public elementary school for which provision is to be made by a local education authority, such whole or part is to be paid to that authority; and any money arising from an endowment, and paid to a county council for those purposes of a public elementary school for which provision is to be made by the council, is to be credited in aid of the rate levied for the purposes of the Act in the parish served by the school, or paid to the overseers in aid of the poor rate.

There is an endowment in this case, and certain statutory consequences ensue. The testator's object was to prevent the money from going in aid of the rates. Under s. 7 of the Education Act, 1902, the total expenditure of a school is not thrown on the local education authority—for instance, the costs of repairs and structural alterations must be borne by the managers—and it is incorrect to say that the school is supported by the rates.

(1) [1904] 1 Ch. 270. (2) [1904] 2 Ch. 767.

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There is not, and there never has been, a representative body for the parish, the scheme of the Act of 1902 being to make use of certain bodies already existing when the Act came into force. By his words as to the school ceasing to be carried on for the purposes of education the donor was referring to denominational education, as regards which the school is much the same as it was before the Act.

The event on the happening of which the fund was to be applied for the benefit of the almshouses has not happened.

PARKER J. The question raised by this summons is whether a certain sum of 1000*l.*, which was undoubtedly an endowment of the National Schools at Alcester, and which as such endowment would be dealt with by s. 13 of the Education Act, 1902, has, by virtue of a certain clause in the instrument creating the trust, been diverted for the purposes of certain almshouses at Alcester. The words of the trust are that the sum of 1000*l.* is to be invested by the trustees "and the income paid to the trustees of the National Schools at Alcester for the purposes of education at such schools and the carrying on of the same until a school board or other representative body under the Education Acts shall be formed for the parish of Alcester or the said National Schools shall otherwise cease to be carried on for the purposes of education, and afterwards the said sum of 1000*l.* shall be devoted as a further endowment fund for the benefit of the almshouses at Alcester established by me."

Now the Education Act, 1902, entirely abolished school boards, and abolished also all representative educational bodies elected or constituted for educational purposes, and it transferred all the powers which would have resided in the elected body under the Education Acts to the existing county authorities, and made them the educational authorities within their areas. It cannot be said, therefore, at any rate with regard to the words "school board," that a school board has been established for the parish of Alcester; and the question arises whether it can truly be said that another representative body under the Education Acts has been formed for the parish of Alcester. I think "other representative body" must mean such a representative body as is

analogous to the school board which might have been formed under the existing Education Acts, or possibly under some amending Act. The expression in my opinion points clearly to a body which is elected in the same way and for the same purposes as the school board, and it would be somewhat of a perversion of language to say that a county council is a representative body formed under the Education Acts for the parish. If one comes to consider what the main idea of the settlor was in this case, I think it must either have been an economical one, that is to say, that he intended to provide for the education of the people of his parish until the education was taken over and fell on the rates, or else that it was a religious one, and he intended to provide for denominational education and withdraw his gift if, by virtue of the Education Acts or any other legislation, denominational education became impossible in that parish. If one looks upon it from either point of view, the event has not happened, for the national schools which were carried on by voluntary subscriptions up to the date of their being taken over by the new educational authority under the Act of 1902 became non-provided schools under the Act, and have still to be maintained to a considerable extent by voluntary subscriptions. If, on the other hand, his purpose was to secure denominational education, and he supposed such education could not be given by the school board, the event would not have happened. The non-provided school under the Act of 1902 is maintained, it is true, to a great extent by the educational authority out of the rates, but in matters of denominational education it remains very much the same as it did before the Act was passed. It seems to me that the words which conclude the clause in question, "or the said National Schools shall otherwise cease to be carried on for the purposes of education," rather point to the settlor having had denominational education in his mind and contemplating that such education as he is alluding to would cease naturally upon the appointment of a school board.

On the whole, I am unable to see in the present case that the event has happened in which the fund was to go over to the almshouses. I therefore hold that it is still an endowment

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and must be dealt with under s. 13 of the Education Act, 1902.

Solicitors for plaintiffs: *Rawle, Johnstone, Gregory, Rowcliffe & Rowcliffe, for Slatter, Son & Gibbs, Stratford-upon-Avon.*

Solicitor for Attorney-General: *Treasury Solicitor.*

Solicitors for county council: *Field, Roscoe & Co., for Edward Field, Leamington.*

F. E.

PARKER J. 1909 *Nov.* 30; *Dec.* 1.

In re WINN. BROOK *v.* WHITTON.

[1909 W. 2977.]

Will—Construction—"Next of kin whoever they may be."

A testator directed the trustees of his will to raise and set apart six sums of 15,000*l.* each, and to hold each of the same upon trust to pay the income to a niece (or nephew) for life, and after her (or his) death to her (or his) husband (or wife), such husband (or wife) to take only half the income if there were issue, and, after trusts in favour of the issue, declared that "in the event of the death of the said niece" or nephew "without issue, or in the event of her" (or "his") "having issue and of such issue happening to die before becoming entitled to the whole of the said trust fund of 15,000*l.*," the trustees should stand possessed of the same "subject to the aforesaid provisions in favour of my said niece" (or "nephew") "and her" (or "his") "said husband" (or "wife") "Upon trust for my next of kin, whoever they may be, living at the time of the trusts failing as aforesaid, except the children or other descendants of my nephew T. W. deceased."

The residue was given to the six nephews and nieces, each of whom was tenant for life of one of the sums of 15,000*l.*

The testator was seventy-three years old when he made his will (in 1854) and he died in 1855. The six nephews and nieces were his sole next of kin at the time of his death and would have been his sole next of kin if he had died immediately after making his will. S., who was the last of them, died in 1902 without issue, leaving a widow, who died in 1909:—

Held that, although the class of next of kin was to be ascertained at the time of the testator's death, only those took who survived the time when the previous trusts failed, and that on the death of the widow of S. his 15,000*l.* fell into residue.

In re Nash, (1894) 71 L. T. 5, followed.

THOMAS WINN, of Lincoln, who died on January 3, 1855, by his will, dated September 16, 1854, after making certain specific

devises and bequests, gave to Richard Carline and Frederick Straw (whom he appointed the executors and trustees of his will), their heirs, executors, administrators, and assigns, all his residuary real and personal estate, upon trust for sale and conversion, and to stand possessed of the proceeds, upon trust in the first place to pay his debts and funeral and testamentary expenses and the legacies thereinbefore given, and duties, and in the next place to set apart, within twelve calendar months after his death, the sum of 90,000*l.*, which was to be applied as follows:

As to 15,000*l.* (one sixth part) upon trust to invest the same, and pay the income to the testator's niece, Elizabeth Brook, for life, and after her death, in the event (which happened) of her leaving no issue, to her husband, William Henry Brook, for his life. Subject to these gifts provision was made for any children or issue of Elizabeth Brook, and there were trusts for their maintenance and otherwise. The will then proceeded as follows: "Provided always and I do declare that in the event of the death of the said Elizabeth Brook without issue, or in the event of her having issue and of such issue happening to die before becoming entitled to the whole of the said trust fund of 15,000*l.*, or the securities upon which the same shall be invested, my said trustees or trustee for the time being shall stand possessed of and interested in the same trust moneys and securities, or so much thereof as shall not have been applied under the trusts aforesaid, subject to the aforesaid provisions in favour of my said niece and her said husband, Upon trust for my next of kin, whoever they may be, living at the time of the trusts failing as aforesaid, except the children or other descendants of my late nephew Thomas Winn, deceased, whose children are hereinbefore, as well as by other means, amply provided for."

The will then made provision for three other nieces and their husbands and issue with regard to three further sums of 15,000*l.* and declared the trusts thereof by reference to the trusts declared as to the previous sum of 15,000*l.*, and then proceeded as follows:

"And with regard to two further sums of 15,000*l.* each, being the two other and remaining sixth parts of the aforesaid sum of 90,000*l.*, I direct and declare that my said trustees and trustee for the time being do and shall stand and be possessed of and

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interested in the same sums respectively, and the income thereof, Upon and for such and the same trusts, ends, intents, and purposes, and with, under, and subject to all or such and the same conditions, powers, provisoes, declarations and limitations, as to each such remaining sum of 15,000*l.* and the income thereof, for or in favour of each of my said nephews, the said Frederick Straw and Thomas Straw, and their respective wives and issue, as are hereinbefore stated with regard to the like sum and the income thereof in favour of my said niece Elizabeth Brook, her husband, and issue, and with the like gift over in favour of my next of kin, except as aforesaid, for want of issue respectively, as hereinbefore mentioned, and as if the names of my said nephews, Frederick Straw and Thomas Straw, respectively, had been hereinbefore written in the place and stead of the name of my said niece and the names of their wives respectively in the place and stead of the name of the said William Henry Brook (altering the gender and omitting the declaration as to coverture) in manner aforesaid."

The testator also directed his trustees to set aside out of the proceeds of his residue a further sum of 5000*l.* and to hold the same and the investments and income thereof upon trusts in favour of Thomas Tatton and his children and issue, with an ultimate gift as follows: "In case of the death of the said Thomas Tatton, without issue living to acquire a vested interest in the said last mentioned trust fund, then I direct that the said sum of 5000*l.* and the securities upon which the same shall be invested shall be paid and applied by my said trustees or trustee for the time being to such person or persons, upon such trusts, and for such uses, intents and purposes as the said Thomas Tatton shall by his last will and testament, duly executed, direct and appoint, and, in default thereof, to my next of kin except as aforesaid."

The testator gave his ultimate residue to the same six nephews and nieces, their executors, administrators, and assigns.

The testator was seventy-three years old at the date of his will, and the six nephews and nieces were his next of kin when he died in 1855, and would have been his next of kin if he had died immediately after making his will.

Frederick Straw survived the remaining five nephews and nieces, and died on December 12, 1902, without leaving issue, but leaving a widow, Lucy Straw, who died on August 6, 1909.

The trustees of the will took out an originating summons for the determination by the Court of the questions (1.) whether the 15,000*l.* settled in favour of F. Straw and his widow and children fell into residue, or (2.) was divisible amongst the persons who would have been the testator's next of kin if he had died immediately after F. Straw, or (3.) was divisible amongst the persons who would have been the testator's next of kin if he had died immediately after Lucy Straw.

F. L. Wright, for the plaintiffs, stated the facts.

Romer, K.C., and *G. R. Northcote*, for the parties appointed to represent the residuary legatees. The general rule is that a reference to a testator's next of kin means the person or persons who were his next of kin at the time of his death; and there is nothing here to take the case out of that rule, although the testator confined the class to those members of it who should be alive when the preceding trusts of any sum of 15,000*l.* failed. The general rule applies notwithstanding the testator has excluded certain persons from the class which is to take: *Lee* v. *Lee*. (1) In a similar case it was held that the class must be ascertained at the time of the testator's death, but that only those members of it who survived the tenant for life could take the property: *In re Nash*. (2) The result of holding that the class was to be ascertained when the preceding trusts failed would be that a different class would take in each case of a 15,000*l.* settled legacy, but there is nothing to suggest that such a result was intended. As all the members of the class died before the death of Lucy Straw, the residuary gift takes effect.

A. Grant, K.C., and *T. J. C. Tomlin*, for the party appointed to represent those who would have been the testator's next of kin if he had died immediately after Frederick Straw's widow. The testator's only next of kin at the time of his death, which occurred very shortly after the date of his will, were his nephews and nieces, and the will seems to refer not to persons then living,

(1) (1860) 1 Dr. & Sm. 85. (2) 71 L. T. 5.

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but to some persons living at a future time, when the nephews and nieces might be dead. If the argument on behalf of the residuary legatees prevails, no effect will be given to the words "whoever they may be." These words shew that the testator did not know what persons would be members of the class, and that what he intended to create was an artificial class which might consist of different persons at the deaths of different tenants for life. In favour of this view is the fact that he excludes from the class persons who would not be his next of kin at the time of his death: *Jones* v. *Colbeck* (1); *Clapton* v. *Bulmer*. (2) [They distinguished *Ware* v. *Rowland* (3) and referred also to *In re Sturge and Great Western Ry. Co.* (4)]

Martelli, K.C., and *W. F. Webster*, for the party appointed to represent those who would have been the testator's next of kin if he had died immediately after Frederick Straw, adopted this argument.

Romer, K.C., in reply.

PARKER J. Before considering the authorities in this case I propose to see what light the will itself, and the particular words of it, throw upon the question for decision.

The gift I have to consider is a gift by reference to a former gift in the will, and I think it will be more simple to deal with the former gift before coming to the gift which is really in question. The testator gave 15,000*l.* to trustees, which they were to invest and hold upon trust to pay the income to the testator's niece Elizabeth Brook for her life, and after her death, in the event, which happened, of her leaving no issue, to her husband for his life. Apparently, if she did leave issue, her husband was to take a life interest in one moiety. Then, subject to those gifts, provision is made for any children or issue of the first tenant for life, Elizabeth Brook, and there are trusts during the minority of those children for their maintenance, and otherwise. Then comes a proviso: "Provided always and I do declare that in the event of the death of the said Elizabeth Brook without issue"—that is the event which happened—

(1) (1802) 8 Ves. 38.
(2) (1840) 5 My. & Cr. 108.
(3) (1848) 2 Ph. 635.
(4) (1881) 19 Ch. D. 444.

"or in the event of her having issue and of such issue happening to die before becoming entitled to the whole of the said trust fund of 15,000*l.*, or the securities upon which the same shall be invested, my said trustees or trustee for the time being shall stand possessed of and interested in the same trust moneys and securities, or so much thereof as shall not have been applied under the trusts aforesaid"—that is, for the benefit of the children, if there were children, who died before obtaining a vested interest—"subject to the aforesaid provisions in favour of my said niece and her said husband"—now come the material words—"upon trust for my next of kin, whoever they may be, living at the time of the trusts failing as aforesaid"—that is to say, living when she dies without issue, or living when, there having been issue, those issue have died without obtaining a vested interest. Then comes an exception from the class: "except the children or other descendants of my late nephew Thomas Winn deceased, whose children are hereinbefore, as well as by other means, amply provided for." If one looks at the gift alone, without reference to the surrounding circumstances, it appears to me that the testator is contemplating a class described as "my next of kin," some members of which may, and some members of which may not, survive a certain period, namely, the period that he refers to as "the time of the trusts failing as aforesaid." The words "whoever they may be" appear to me to indicate a doubt in the testator's mind, and that doubt is capable, in my judgment, of explanation in one or other of two possible ways. Of course no man is aware who his next of kin will be at the date of his death. That is the first doubt. The second doubt is that it is "whoever they may be, living" at a future time; and though grammatically "whoever they may be" refers to the next of kin, I think it is possible that the testator's doubt was in reference to the words "living at the time of the trusts failing." It is not quite the grammatical way of expressing it, but it is a possible way in my opinion.

Now we come to the exception—"except the children or other descendants of my late nephew Thomas Winn deceased." It appears from the will itself that there were nephews and nieces of the testator living at the date of the will, and it also

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appears as a matter of law that, unless all those nephews and nieces were to die before the date of the testator's death, the children or other descendants of the late nephew Thomas could not come in as next of kin, whether "next of kin" refers to nearest in blood, which is really the natural meaning of the words, or whether it refers to the enlarged class of next of kin under the statute, because there are cases under the statute where children represent parents, but there is no representation of parents by children in the case of a nephew and niece. Therefore, naturally, it would appear that the testator is contemplating the possibility of the next of kin, that is to say, the class who are to take when the time comes, including somebody who will not be next of kin, if the circumstances remain the same as at the date of the testator's death. It is possible he may have contemplated the death of his nephews and nieces before his own death, though he was an old man, and it is possible also that he may have been contemplating a class to be ascertained at a future time, which might include children of nephews and nieces. Either of those things appears to be possible.

Having said that about the form of the original gift, let me go on and see what the rest of the will says. It goes on to declare with regard to two further sums of 15,000*l.* "that my said trustees and trustee for the time being do and shall stand and be possessed of and interested in the same sums respectively, and the income thereof, upon and for such and the same trusts, ends, intents, and purposes, and with, under, and subject to all or such and the same conditions, powers, provisoes, declarations, and limitations, as to each such remaining sum of 15,000*l.* and the income thereof, for or in favour of each of my said nephews, the said Frederick Straw and Thomas Straw, and their respective wives and issue, as are hereinbefore stated with regard to the like sum and the income thereof in favour of my said niece Elizabeth Brook, her husband and issue, and with the like gift over in favour of my next of kin, except as aforesaid, for want of issue respectively, as hereinbefore mentioned, and as if the names of my said nephews Frederick Straw and Thomas Straw, respectively, had been hereinbefore written in the place and stead of the name of my said niece and the names of their

wives respectively in the place and stead of the name of the said William Henry Brook (altering the gender and omitting the declaration as to coverture) in manner aforesaid." Now it appears to me that the form of this gift, and in particular the expression "with the like gift over in favour of my next of kin except as aforesaid," really points to this: that the testator contemplated that, in respect of the final limitation of all these sums of 15,000*l.*, the same class would take, subject, however, in each case to their surviving what I may call the period of distribution, namely, the failure of the preceding trusts; and it does not seem to me that the words are so appropriate if I am to assume that the testator meant that in the case of each sum of 15,000*l.* there would be a different class to take under the ultimate limitation in favour of the next of kin.

Further on in the will I find a gift to Thomas Tatton, and trusts in favour of his children and issue, with an ultimate gift in this form: "In case of the death of the said Thomas Tatton, without issue living to acquire a vested interest in the said last mentioned trust fund, then I direct that the said sum of 5000*l.*, and the securities upon which the same shall be invested, shall be paid and applied by my said trustees or trustee for the time being to such person or persons upon such trusts, and for such uses, intents, and purposes as the said Thomas Tatton shall by his last will and testament, duly executed, direct and appoint, and, in default thereof, to my next of kin except as aforesaid." There is no limitation in that case making it necessary for those members of the class of next of kin who are to take to survive the period of distribution. It seems to me, therefore, looking at the will alone, that, except for any inference which is to be drawn from the use of the words "whoever they may be," or from the exception of "the children or other descendants of my late nephew Thomas Winn," or from the condition of the family at the date of the death, and the fact which I have not mentioned at present, and which I do not think is very material, that the residuary gift is in favour of nephews and nieces, who, had things remained at the date of the testator's death in the same position as they were at the date of his will, would have been his next of kin—

PARKER J. except for any inference from all those facts, it appears to me that the natural construction of the words is that there is to be in the case of all the legacies of 15,000*l.* a class ascertained at the same time, and that the members of that class so ascertained who are living at the period of distribution in the case of each legacy are to be entitled under the ultimate gift of that legacy.

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Of course, in every case of a gift "to my next of kin," or "my nearest relations," or any gift of that kind, prima facie the rule is, and I think it is not only a rule of construction, but the natural meaning of the words, that the class is to be ascertained at the death of the testator. When the testator dies, certain people answer the description of his relatives, or his next of kin, or his nearest in blood, or any of those expressions; and it is difficult to see in the present case, if I am right in the construction I put on the words, namely, that he is contemplating a class some of whom may survive, and some of whom may die before a certain period, at what other time the class is to be ascertained than at the date of the testator's death. Thus it appears to me that the most natural construction, apart from authority, and apart from those particular circumstances to which I have already referred, is that this is a gift to the next of kin, to be ascertained at the testator's death, but that any one of the class so ascertained, in order to take under the ultimate gift, has to survive that period.

Now I will consider the special circumstances of the case. It is said that, having regard to the expression "whoever they may be," and to the doubt raised by that expression, and having regard to the exception of children or other descendants of his nephew, such children or other descendants not being, as a matter of fact, within the class next of kin at the time of the death; having regard also to the state of the testator's family, namely, that at the time he had numerous nephews and nieces then living, and that he was an old man, and the nephews and nieces are residuary legatees, I ought to draw the contrary inference and say that the class in this case really is to be ascertained at the failure of the prior trust in respect of each legacy of 15,000*l.* Of course the first and initial difficulty in giving that construction to the words is that

it would really be striking out the word "living" altogether. I think, if the words had been "in trust for my next of kin at the time of the trust failing as aforesaid," there would have been very strong ground for saying that that class was to be ascertained on the failure of the trust; but it seems to me that the class which is to be ascertained is more numerous than the members who ultimately take, or may be more numerous, because it is a class some members of which may, in the contemplation of the testator, live beyond the period of distribution and some members of which may not. That is the first difficulty to my mind in that construction, and it appears to me really an insuperable difficulty.

With regard to the other points which have been raised as to the expression "whoever they may be," I have already in part dealt with that. It appears to me that those words may either mean the doubt in the testator's mind as to who will be his next of kin, which, after all, is a very reasonable doubt, or may refer to what he is going to say, and mean that he is in doubt as to which of the next of kin may survive the period.

With regard to the exception, I have come to the conclusion that no great weight ought to be attached to it. Supposing I assume the testator knew all the material facts, and was aware of all the legal principles to be considered in construing his will, he clearly does contemplate that the ultimate gift of the 5000*l.* which is given to Thomas Tatton may go to a class which includes the children or other descendants of a nephew. If he was in doubt with regard to a gift which plainly must be a gift to his next of kin ascertained at his death, it does not appear to me that one can attach any very great importance to the fact that with regard to the class to take other gifts he has expressed a similar doubt. I need not explain the doubt in the latter case by supposing him to be contemplating a class to be ascertained after his death, because in the former case where the class must be ascertained at his death a similar doubt is expressed.

Lastly, there is the question of the residuary gift. Of course, in a sense, when a testator makes anybody his residuary legatee, and leaves his property to them, he does contemplate that the residuary gift shall take effect. But I do not think I

PARKER J. ought to say that the other gifts in the will, as to which, taken alone, no reasonable doubt arises, ought to be construed on the footing that the testator made them only on the supposition that the residuary gift would take effect. It appears to me that it would be carrying the argument as to what the testator contemplates too far. I cannot therefore draw any inference from the fact that the residuary legatees would have been the testator's next of kin if he had died immediately after making his will.

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I come to the conclusion that, looking at the will, apart from authority, the class is to be ascertained at the death, only those members taking who survive the period of distribution; and it seems to me that this decision is practically on all fours with the decision of the Court of Appeal in *In re Nash.* (1) In that case the testator gave his residuary estate to his wife for life, and after her death to the "nearest relatives then living (to be hereafter named in a codicil)." He died without having executed any codicil, and it was held that the class must be ascertained at the death of the testator, namely, his next of kin by blood at that date, but that only those members of the class could take who survived the wife. That case is important, having regard to the argument which has been put forward by Mr. Grant and Mr. Tomlin, that it is much easier to construe a clause of this nature as having reference to an artificial class to be ascertained at a future period than it would be if that class were the next of kin according to statute. Of course in *In re Nash* (1) there were none of the circumstances in this case, which are said to be exceptional, to take the gift out of what I may call the general rule, but that case does shew that a gift to the nearest relatives then living is to be construed as a gift to the nearest of blood, the class to be ascertained at the testator's death, but only those taking who survive the period of distribution; and, so far as that goes, it is on all fours with this case which I have to decide.

I therefore come to the conclusion that the exceptional circumstances to which I have been referred have not the weight which has been attached to them by counsel, and disregarding them, the case really becomes one on all fours with the decision of

(1) 71 L. T. 5.

the Court of Appeal in *In re Nash*. (1) In *In re Nash* (1) Lord Davey (then Davey L.J.) says this (2), quoting from Jarman on Wills, 5th ed., vol. ii. p. 983: "Where a testator directed personal estate, and the produce of real estate, to be laid out for accumulation for ten years, and then a certain part thereof divided among such of the testator's next of kin and personal representatives as should be then living, Lord Thurlow held, that the next of kin at the testator's death, surviving the specified period, were entitled; for it was plain that the testator meant some class of persons, of whom it was doubtful whether they would live ten years." Then Lord Davey says, "That seems to me to be good sense, good logic, and good law"; and he therefore agrees with the decision of the other learned judges.

With regard to the other cases to which my attention has been called, I am not sure that it is necessary to deal with them, but, as I understand the law as appearing from those cases, it is as follows. Where there is a gift to next of kin, or nearest of blood, or any similar gift, the time at which the class is to be ascertained is the death of the testator. It is always possible for a testator to say that the class is to be ascertained at a later time, and if the testator makes a gift to a tenant for life, and "after the death of the tenant for life to the persons who shall then be my relatives or my next of kin," it is perfectly clear that, apart from any reference to the Statute of Distributions, the class is to be ascertained at the death of the tenant for life in accordance with the express language of the testator. But where a testator, referring to his statutory next of kin, uses expressions such as "the persons who shall then be entitled by virtue of the Statute of Distributions," the ordinary rule which would have ascertained the class at the time to which the word "then" points, is or may be rebutted, because of the necessity for every person who claims under the gift to prove his title by virtue of the Statute of Distributions; and the case of *Bullock* v. *Downes* (3) and similar cases appear to me to be really exceptions based upon the necessity of proving a title by virtue of the statute.

I hold, therefore, in the present case that the class is the class

(1) 71 L. T. 5. (2) 71 L. T. 7.
(3) (1860) 9 H. L. C. 1.

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of next of kin at the death of the testator, and only those members of the class take who survive the period. The result is that the gift, which does not take effect in this case, falls into residue and becomes divisible amongst the residuary legatees named in the will or their legal personal representatives.

Solicitors for plaintiffs: *Stileman & Neate, for Toynbee, Larken, Mason & Co., Lincoln.*

Solicitors for defendants: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for A. Trotter, Lincoln;* and *Page & Scorer, for Burton, Scorers & White, Lincoln.*

F. E.

JOYCE J. 1909 *Oct.* 27, 28; *Dec.* 7.

In re PETRE'S SETTLEMENT TRUSTS. LEGH *v.* PETRE.

[1909 P. 731.]

Settlement—Construction—Power of Revocation—Person entitled to the "actual possession"—"Under the limitations of the settlement"—Assignment by Tenant in Tail of Life Interest in Remainder—Death of Tenant for Life.

Under the P. settlement the P. estates stood limited to B. for life, remainder to his first and other sons successively in tail male, remainder to P. for life, remainder to his first and other sons successively in tail male, with remainders over. During the life of B., P. executed a marriage settlement which provided that in case P. should become entitled to the actual possession or the actual receipt of the rents and profits of the P. estates under the limitations of the P. settlement it should be lawful for him to revoke certain trusts declared by his marriage settlement. P. subsequently assigned his life interest in the P. estates to B. On the death of B. without issue his executors and trustees went into possession of the P. estates as assignees of the life estate of P. After the death of B., P. by a deed poll purported to exercise his power of revoking the trusts of his marriage settlement:—

Held that, notwithstanding the assignment by P. of his life estate to B., P. on the death of B. became entitled to "the actual possession" of the P. estates "under the limitations of" the P. settlement, and that his power of revocation had consequently arisen and was effectually exercised.

By an indenture of settlement (hereinafter called "the Petre settlement") dated December 14, 1868, and made between William Bernard, Lord Petre, and William Joseph Petre, his eldest

son, of the first part, the said William Bernard, Lord Petre, of the second part, and Marmaduke Constable Maxwell and Edward Petre of the third part, certain lands and hereditaments in the county of Essex were assured and at the date of the next stated indenture stood limited to the use of the said William Joseph, at the last-mentioned date Lord Petre, for life, with remainder to the use of his first and other sons successively in tail male, with remainder to the use of Bernard Henry Philip Petre for life, with remainder to the use of his first and other sons successively in tail male, with remainder to the use of Philip Benedict Joseph Petre for life, with remainder to the use of his first and other sons successively in tail male, with remainders over. The Petre settlement conferred upon a tenant for life thereunder a power, either before or after he should become entitled to the possession or the receipt of the rents and profits of the Petre estates, to charge the said estates by way of jointure and portions for younger children.

By an indenture dated July 18, 1888, Philip Benedict Joseph Petre, in consideration of his then intended marriage, exercised the power of jointuring and charging portions in favour of his wife and children. By another indenture of the same date, being the settlement executed upon the marriage of Philip Benedict Joseph Petre and Julia Mary Taylor, a sum of 4000*l.*, covenanted to be paid by the wife's father, and certain investments transferred to the trustees by the husband (thereinafter called the husband's trust fund) were settled upon the usual trusts for the husband and wife during their respective lives and after the death of the survivor of them for the children of the marriage as the husband and wife or the survivor of them should appoint, and in default of appointment in trust for all the children as therein mentioned; and it was by the said marriage settlement agreed and declared that "in case the said Philip Benedict Joseph Petre should become entitled to the actual possession or the actual receipt of the rents and profits of the Petre estates under the limitations of the Petre settlement or any resettlement of the same estates it should be lawful for the said Philip Benedict Joseph Petre at any time or times thereafter by any deed or deeds revocable or irrevocable or by will or codicil expressly

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referring to that power wholly or partially to revoke the trusts powers and provisions therein declared of and concerning 'the husband's trust fund' and the income thereof and to declare such new or other trusts of and concerning the same or any part or parts thereof as he might think fit for the benefit of himself the said Philip Benedict Joseph Petre or any other person or persons."

William Joseph, Lord Petre, died on May 8, 1893, without ever having been married, and thereupon Bernard Henry Philip, Lord Petre, became entitled under the limitations of the Petre settlement to the Petre estates for his life.

By an indenture dated January 22, 1896, Philip Benedict Joseph Petre for valuable consideration assigned his life estate expectant on the death and failure of issue of Bernard, Lord Petre, under the Petre settlement to a trustee upon and for such trusts as Bernard, Lord Petre, should by deed or will appoint, and in default of such appointment in trust for Bernard, Lord Petre, his executors, administrators, and assigns absolutely.

Bernard, Lord Petre, died on June 16, 1908, without ever having had any male issue, and thereupon Philip, Lord Petre, became entitled to the Petre estates under the limitations of the Petre settlement, subject nevertheless to the indenture of January 22, 1896.

By a deed poll dated June 20, 1908, Philip, Lord Petre, in professed exercise of the power for that purpose reserved to him by the marriage settlement of July 18, 1888, revoked the trusts, powers, and provisions declared by the marriage settlement of and concerning "the husband's trust fund."

Bernard, Lord Petre, by his will dated October 28, 1907, after appointing executors and trustees thereof, directed that, subject to a proviso for cesser therein contained, his trustees should out of the net income of the life interest of Philip, Lord Petre, pay to him during his life, or until some son of his who, being tenant in tail male expectant on the death of Philip, Lord Petre, should attain twenty-one, an annuity of 1000*l.* to commence from the testator's death.

Upon the death of Bernard, Lord Petre, his executors and trustees went into possession of the Petre estates as assignees of

the life estate therein of Philip, Lord Petre, and continued in possession thereof until his death.

Philip, Lord Petre, died on December 6, 1908, leaving his widow, Julia, Lady Petre, and three children, all of whom were infants, him surviving.

This was an originating summons taken out by the sole surviving trustee of the marriage settlement for the determination of the question whether upon the construction of that settlement and in the events which had happened Philip, Lord Petre, had power to revoke and did effectually revoke the trusts thereby declared of and concerning "the husband's trust fund" therein comprised, or whether the stocks, funds, and securities now representing "the husband's trust fund" ought to be held by the plaintiff upon the trusts of the said marriage settlement.

Sheldon, for the plaintiff.

Hartree, for Lady Petre and her three children. The power of revocation under the settlement never arose. It was only to arise in the event of Philip, Lord Petre, becoming entitled to the "actual possession" of the estates. He never became so entitled "Actual possession" means possession in fact, or physical possession, as distinguished from possession in law: *Murray* v. *Thorniley* (1); Stroud's Judicial Dictionary, 2nd ed., p. 1513. In *Rex* v. *The Inhabitants of St. Nicholas, Rochester* (2), it was held that the lessee of a house for a year who had sub-let a portion of the premises was not in actual occupation of the whole tenement within 1 Will. 4, c. 18, so as to gain a settlement. The statute requiring in terms an actual occupation, it was not satisfied by constructive occupation. See also *Lord Scarsdale* v. *Curzon* (3) and *Jones* v. *Chapman*. (4) If mere constructive legal possession had been intended in this case, then the word "possession" simply would have been used.

A settlement of this kind should be construed strictly against the settlor. He cannot take advantage of an ambiguity in his own deed. The power of revocation is in the nature of and ought to be construed as a shifting clause which is always

(1) (1846) 2 C. B. 217.
(2) (1833) 5 B. & Ad. 219.
(3) (1860) 1 J. & H. 40.
(4) (1849) 2 Ex. 803.

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construed strictly. It must be taken away in as express and clear a way as it is given.

Hughes, *K.C.*, and *C. J. Mathew*, for persons claiming under assignments by Philip, Lord Petre, in revocation of the settlement. On the death of Bernard, Lord Petre, Philip, Lord Petre, became tenant for life under the limitations of the Petre settlement and entitled to the actual possession of the Petre estate. His power of revocation therefore arose. It is true that under the deed of January 22, 1896, some one else became entitled in virtue of Philip, Lord Petre's right to receive the rents and profits during his life; still he himself was actually entitled in possession.

This case is covered by the decision in *Hogg* v. *Jones* (1), where there was a gift of heirlooms by reference to the possession of real estate, and it was held that the heirlooms went to a person who was in fact deprived of the possession of the real estate by disentail.

The use of the word "actual" does not necessarily advance the meaning of the word to which it is applied: Stroud's Judicial Dictionary, 2nd ed., p. 32. Any argument based on the cases under the Settled Land Act, such as *In re Morgan* (2) and *In re Jones* (3), may be illustrative but cannot be conclusive. The only document to be looked at is the original settlement of 1868, and the governing words are "under the limitations of the settlement." The power of revocation clearly arose. [They also referred to *In re Lord Chesham's Settlement* (4) and Vaizey on Settlements, p. 1349.]

Hartree in reply. The cases as to heirlooms do not apply here.

Cur. adv. vult.

Dec. 7. JOYCE J. (after stating the facts). Upon the death of Bernard, Lord Petre, without issue, Philip, Lord Petre, became tenant for life in possession of the Petre estates, at least nominally if not actually. In ordinary language he did not become entitled to the possession of the estates, still less to the actual possession, because, if by "actual possession" physical possession is meant, upon the death of Bernard the person who

(1) (1863) 32 Beav. 45.
(2) (1883) 24 Ch. D. 114.
(3) (1884) 26 Ch. D. 736.
(4) [1909] 2 Ch. 329.

became entitled to such actual possession and the receipt of the rents and profits of the estates was the assignee under the deed of assignment of 1896. But the words in the proviso creating the power of revocation are "shall become entitled," and so on, "under the limitations contained in the Petre settlement or any resettlement of those estates," and those words "under the limitations of the Petre settlement or any resettlement" limit and qualify the expression "actual possession."

Now if Philip, Lord Petre, had purchased the previous life estate of Bernard, Lord Petre, he would have been entitled to the physical possession; but would he have become entitled to the possession of the estates "under the limitations of the Petre settlement"? Having regard to the case of *Truell* v. *Tysson* (1), to which I think my attention was not called by any counsel who argued before me, I think it would be difficult to say that, in the event which I have supposed, Philip, Lord Petre, would not have become entitled to the possession of the estates under the limitations of the settlement; but it could not possibly have been intended that the existence of this power of revocation should be accelerated in any such way as that, namely, by the purchase by Philip, Lord Petre, of the previous life estate of Bernard, Lord Petre.

I observe that in a previous clause of this document, a clause with reference to the division amongst the children in default of appointment of the funds forming the subject of the settlement, this fund is not to go to all the children, but to the children with an exception; and there is excepted, amongst other children, any child who before attaining the age of twenty-one "becomes entitled to the first vested estate of freehold in remainder immediately expectant on the estate for life of the said Philip Benedict Joseph Petre under the said settlement, provided the said Philip Benedict Joseph Petre had become entitled to the actual possession or to the actual receipt of the rents and profits of the Petre estates." Upon consideration I think that clause does not assist me, because I strongly suspect the words "under the limitations of the

(1) (1856) 21 Beav. 437.

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settlement" have per incuriam been there left out. Another observation I must make is that under this power of revocation, if Philip came into the actual possession, whatever that meant, for a single day, he could then have revoked the trusts of the husband's trust fund.

Now it appears (I am quoting from Vaizey on Settlements, p. 1349) that "In several cases tenants in tail in remainder were treated as persons entitled to the possession, so as also to entitle them to personalty, which was in one case to be enjoyed by the persons successively entitled to the possession of the settled realty," &c.; and Mr. Vaizey suggests the addition of the word "actual" and the use of the expression "actual possession" with the idea of preventing any such result as that. Having regard to all this, and to what was said in the judgment in *Hogg* v. *Jones* (1), which was cited to me, upon the whole I think that "entitled to the actual possession under the limitations" means here entitled to such possession, looking to the terms of the settlement, and not regarding anything else. I think that the purchase of a previous life estate would not confer such actual possession as would be required to entitle Philip, Lord Petre, to exercise this power; and that a previous mortgage or assignment by Philip, Lord Petre, of his life interest would not prevent his becoming entitled to the actual possession under the limitations within the meaning of that term as used in this clause conferring the power of revocation. Upon the whole, therefore, though it may appear somewhat strange at first sight, I think that Philip, Lord Petre, did, upon the death of Bernard, Lord Petre, without issue, become entitled to the actual possession of the estates under the limitations of the Petre settlement, although there had been a previous assignment by Philip, Lord Petre, of his life estate, and I think that upon the true construction of the marriage settlement the power of revocation consequently arose.

Solicitors: *Simpson & Bowen; Witham, Roskell, Munster & Weld; Fooks, Chadwick, Arnold & Chadwick.*

(1) 32 Beav. 45.

G. A. S.

C. A.
1910
Jan. 27, 28;
Feb. 9.

NOTTIDGE *v.* DERING.

[1909 N. 632.]

RABAN *v.* DERING.

[1909 R. 781.]

Settlement—Tenant for Life—Power to appoint Portions—Disentailing Deed—Mortgage of Settled Estates—Covenant for Quiet Enjoyment—Appointment of Portions—Priority—Derogation from Grant—Implied Release of Power.

Under a marriage settlement made in 1832 estates stood limited in 1854 to the use of A. for life, remainder to the use of trustees for a long term of years to secure 20,000*l.* as portions for the younger children of the marriage, with remainder to B. (A.'s eldest son) in tail male, with remainders over; and the settlement contained a power for A. by deed or will to appoint the further sum of 10,000*l.* as portions for younger children. In 1854 B., with A.'s consent, executed a disentailing assurance by which the estates were assured (subject to the uses and estates created by the settlement anterior to B.'s estate tail and to all powers to such precedent estates annexed) to such uses as A. and B. should by deed jointly appoint. Thereupon A. and B., in exercise of their joint power, created a mortgage over the estates; they also created a further mortgage over the estates partly by the exercise of their joint power and partly by a grant of A.'s life estate. In each case, upon the construction placed by the Court upon the mortgages, the lands were assured by the operative part subject to the power to appoint the further sum of 10,000*l.* as portions. Each mortgage contained a joint and several covenant by the mortgagors for quiet enjoyment, "and that free and clear and freely and clearly acquitted and exonerated or released" or otherwise indemnified of, from, and against (inter alia) former or other gifts, leases, jointures, portions, and all other incumbrances whatsoever. A. died, having by his will charged the estates with the further sum of 10,000*l.* as portions for younger children. Questions of priority having arisen as between these further portions and the mortgages:—

Held, that the covenant for quiet enjoyment did not enlarge the operation of the security and did not amount to a release by A. of his power to appoint further portions; and therefore that the further portions had priority over the mortgages.

Scrope v. *Offley*, (1736) 1 Bro. P. C. 276, distinguished.

APPEAL from a decision of Neville J. upon a special case. (1)

By an indenture of appointment and release (hereinafter called "the settlement") dated April 7, 1832, being the settlement executed on the marriage of Sir Edward Cholmeley Dering and

(1) [1909] 2 Ch. 647.

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Dame Jane Dering, estates in the county of Kent were limited (subject as to a part thereof to a yearly rent-charge of 1000*l.* then previously limited to Dame Henrietta Geary for her life and to a term of 400 years for securing the same) to the use of Sir E. C. Dering for his life, with remainder to uses limiting to Dame Jane Dering a yearly rent-charge of 1200*l.* if she survived her husband and a term of 300 years to trustees for securing the same, with remainder to trustees for a term of 600 years from the death of Sir E. C. Dering, with remainder, subject to the said yearly rent-charge of 1200*l.* and to the two terms of 300 years and 600 years and to the trusts thereof respectively, to the use of the first and every son of the marriage successively in tail male, with remainders over. The trusts of the term of 600 years were to levy and raise 20,000*l.* as portions for the younger children of the marriage, and the settlement also contained a power for Sir E. C. Dering at any time to charge the settled estates with the further sum of 10,000*l.* for portions for the younger children of the marriage as he should by deed or will appoint, and to limit any term of years upon trusts to raise the same by sale or mortgage. The settlement also conferred upon Sir E. C. Dering a power to jointure a future wife and to charge portions for the children of a future marriage and the usual powers of leasing.

By a supplemental settlement dated May 5, 1832, certain other estates in the county of Kent were settled to the same uses and upon and for the same trusts and subject to the same powers as were in and by the settlement limited and contained concerning the estates comprised therein.

There was issue of the marriage E. C. Dering, who was the eldest son, and several other children. E. C. Dering attained the age of twenty-one years on July 21, 1854.

By a disentailing deed dated October 30, 1854, which recited (among other things) the power to raise the further sum of 10,000*l.* for portions, E. C. Dering, with the consent of his father, Sir E. C. Dering, as protector of the settlement, granted unto Francis Geary and Julius Deedes, their heirs and assigns, all the estates then subject to the settlement and supplemental settlement of 1832 (but subject to the rent-charge of 1000*l.* to

Dame Henrietta Geary and the term of 400 years for securing the same, and subject also to the several uses, estates, terms, trusts and charges created, limited and declared in the settlement anterior to the uses or limitations to or in favour of the first and other sons of the marriage in tail male, "and all powers rights and privileges to such precedent estates terms trusts and charges and every or any of them belonging or annexed or exercisable in respect thereof"), to hold the said estates thereby granted "(subject nevertheless and without prejudice as aforesaid)" unto the said Francis Geary and Julius Deedes, their heirs and assigns, to such uses, &c., as Sir E. C. Dering and his son E. C. Dering should at any time or times during their joint lives by any deed or deeds jointly direct, limit, or appoint, and in default of such joint direction, limitation, or appointment to the uses therein declared.

At the date of the disentailing deed the estates comprised in the term of 600 years created by the settlement for raising portions for the younger children were as follows: (*a*) The Surrenden property, (*b*) the Romney property, and (*c*) the Burmarsh property. From time to time, after the execution of the settlement and supplemental settlement, and before the execution of the disentailing deed, Sir E. C. Dering created divers mortgages and charges upon his life estate in the settled estates, together with divers policies of assurance on his life, for securing divers sums of money with interest; and at the date of the disentailing deed the Romney property and some of the policies were vested in Thomas Fowke for the respective residues of certain terms of years (if Sir E. C. Dering should so long live) by way of mortgage to secure 18,000*l.* and interest, and the Burmarsh property and the rest of the policies were vested in Mrs. Isabella Apletre for the respective residues of certain terms of years (if Sir E. C. Dering should so long live) by way of mortgage to secure 3600*l.* and interest; and in pursuance of an arrangement made on the execution of the disentailing deed the policies were released and reassigned to Sir E. C. Dering, and the two following deeds were executed for better securing the respective mortgage debts.

By an indenture of mortgage (hereinafter called the Romney

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mortgage) dated November 18, 1854, and made between Sir E. C. Dering and his son E. C. Dering of the one part and Fowke of the other part, after reciting (amongst other things) the various prior deeds under which the incumbrances on the life estate of Sir E. C. Dering were created, and reciting also the settlement, the supplemental settlement, the disentailing deed, and the said arrangement and reassignment of policies, and reciting also the agreement that for further securing the money due Sir E. C. Dering and his son should appoint the Romney property in manner therein mentioned, it was witnessed that, in consideration of the premises and of the sum of 18,000*l.* then owing to Fowke as aforesaid and for further and better securing the payment of the same and the interest thereof, Sir E. C. Dering and his son E. C. Dering, in exercise and execution of the power or authority given, limited, or reserved to them by the disentailing deed, and of every other power or authority in anywise enabling them in that behalf, appointed that the Romney property should thenceforth remain and be to the use of Fowke for and during the term of 1000 years to commence from the date of the deed, subject as to such parts of the said hereditaments as were charged therewith to the rent-charge of 1000*l.* and to the term of 400 years for securing the same, and subject as to all the said hereditaments to the uses, limitations, trusts, and estates by the settlement and supplemental settlement created and declared thereof anterior to the said uses or estates to the first and other sons of Sir E. C. Dering by his wife Dame Jane successively in tail male and to all powers and privileges to such uses, limitations, trusts, and estates or any of them belonging or annexed or exercisable in respect thereof, and also subject to a proviso for redemption on payment of the 18,000*l.* and interest. By this deed Sir E. C. Dering covenanted to pay the 18,000*l.* and interest and Sir E. C. Dering and his son jointly and severally covenanted that they had good right to limit and appoint the property to Fowke for the term of 1000 years "subject and in manner aforesaid," and also that after default it should be lawful for Fowke to enter upon the property and take the rents and profits thereof "without any let suit trouble interruption or denial whatsoever of from or by them the said

Sir Edward Cholmeley Dering and Edward Cholmeley Dering or either of them their or either of their heirs or any other person or persons whomsoever and that free and clear and freely and clearly acquitted and exonerated released and discharged or otherwise by them the said Sir Edward Cholmeley Dering and Edward Cholmeley Dering or one of them their or one of their heirs executors or administrators at their or his costs and charges in all things well and sufficiently protected saved harmless and indemnified of from and against all and all manner of former and other gifts grants feoffments mortgages leases bargains sales jointures dower and right to dower uses trusts wills entails annuities portions and especially the said annuity or rent-charge of 1000*l.* and the said annuity or rent charge limited to the said Dame Jane Dering during her life by the aforesaid indenture of the 7th day of April 1832 and the portions thereby provided for the younger children of her said then intended marriage and all interest and maintenance money in respect thereof legacies rents and arrears of rent statutes recognizances judgments extents executions suits decrees debts and all other estates titles troubles charges liens and incumbrances whatsoever." And there was a covenant for further assurance. Then followed a declaration that the trustee of the terms of years created by the mortgages of Sir E. C. Dering's life estate should stand possessed of the premises in the first place for better securing the payment of the sum of 18,000*l.* and interest and subject and without prejudice as aforesaid upon trust for Sir E. C. Dering and his assigns, and Fowke consented and agreed that until default should be made it should be lawful for Sir E. C. Dering or his assigns or for the person or persons entitled to the equity of redemption to hold, occupy, and enjoy and receive the rents and profits of the property.

This mortgage was now vested in the plaintiffs in the action of *Nottidge* v. *Dering.*

By another indenture of mortgage of the same date, namely, November 18, 1854 (hereinafter called the Burmarsh mortgage), the Burmarsh property was appointed in similar terms to the use of Mrs. Isabella Apletre for a term of 900 years to secure the payment of the sum of 3600*l.* with interest. This mortgage was

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now vested in Fanny Raban, one of the plaintiffs in the action of *Raban* v. *Dering*.

By another indenture of mortgage (hereinafter called the Romney and Burmarsh mortgage) dated November 20, 1854, and made between Sir E. C. Dering and his son of the one part and the Rev. J. Gould, T. Pryor, and N. Wetherell of the other part, after reciting (amongst other things) the settlement and the supplemental settlement, including the power in the settlement to Sir E. C Dering to charge a further sum of 10,000*l.* for further portions, and reciting fully the disentailing deed, including the habendum with the words "subject nevertheless and without prejudice as aforesaid," and reciting an agreement that the mortgagees should advance 6400*l.* upon the terms that the amount should be secured by an appointment of the settled property and by the covenants and provisions therein contained, it was witnessed, first, that Sir E. C. Dering and his son, in exercise of the power given to them by the disentailing deed, jointly appointed the settled property "subject to the annuities charges mortgages and incumbrances hereinbefore referred to" unto the mortgagees for the term of 1300 years thence next ensuing, but subject to the proviso for redemption thereinafter contained; and, secondly, that Sir E. C. Dering and his son and each of them granted and demised the settled estates to the mortgagees for and during the said term of 1300 years, "but subject to and without prejudice as aforesaid," and subject also to the proviso for redemption thereinafter contained. The deed contained joint and several covenants by Sir E. C. Dering and his son for payment of the mortgage money and interest and full covenants for title similar, mutatis mutandis, to the covenants in the mortgages of November 18.

This Romney and Burmarsh mortgage was now vested in Sir F. Raban and W. Raban, the other plaintiffs in the action of *Raban* v. *Dering*.

Sir E. C. Dering survived his son E. C. Dering and died in 1896, having by his will, in exercise of the power given him by the settlement, appointed the further sum of 10,000*l.* in favour of his younger children and charged the settled estates with the same in addition to the 20,000*l.* to be raised under the trusts of

the term of 600 years. The defendant Sir H. E. Dering was, in the events which happened, now entitled in fee simple in possession to the settled estates subject (inter alia) to the said mortgages.

Owing to the depreciation in the value of the estates these two actions were brought for a declaration that the mortgages in question had priority over the 10,000*l.* charge for portions. The actions were consolidated, and by agreement a special case was stated to determine the question of priority.

Neville J. held that the portions had priority.

The plaintiffs appealed.

Peterson, K.C., and *A. Whitaker*, for the plaintiffs in the first action. The object of the Romney mortgage was to give to Fowke better and further security, and upon the fair reading of the deed it was the intention of the parties, having regard especially to the immediate power of entry on default, that this mortgage should in some way affect Sir Edward's life estate. But assuming that that were not so, there is sufficient in the covenant for quiet enjoyment to shew that the grantor, the tenant for life, ought not to be allowed to exercise this power to appoint further portions in favour of the younger children. The exercise of this power would be inconsistent with the terms of the covenant, and the mortgage operates in equity as an implied release of the power: *Scrope* v. *Offley* (1); *Harvey* v. *Harvey* (2); Sugden on Powers, 8th ed. p. 618; Farwell on Powers, 2nd ed. p. 16; *Smith* v. *Death* (3); *Hurst* v. *Hurst*. (4)

Butcher, K.C., and *Rosher*, for the plaintiffs in the second action, adopted the arguments urged on behalf of the first appellants, and continued:—Those arguments apply with increased force to the Romney and Burmarsh mortgage, which differs from the two other mortgages, first in expressly including the life estate as well as the reversion, and secondly in being made subject to existing charges only. The principle stated in Farwell on Powers is approved in *In re Hancock*. (5)

Jenkins, K.C., and *Errington*, for the respondent. *Scrope* v.

(1) 1 Bro. P. C. 276.
(2) (1740) Barn. Ch. 109, 112.
(3) (1820) 5 Madd. 371.
(4) (1852) 16 Beav. 372.
(5) [1896] 2 Ch. 173.

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Offley (1) was decided upon the special terms of the covenant in that case, which was not the ordinary covenant for quiet enjoyment; it was not a general decision as to the effect of covenants for title. The form of covenant given in Platt on Covenants, p. 330, is almost identical with the covenant in the mortgages in this case and shews that that covenant is substantially in common form. The clause as to taking possession on default was not intended to enlarge the grant, but is correlative to the power of the mortgagors to retain possession until default. Covenants for title are personal covenants ancillary to the grant and must be read consistently therewith. The first two mortgages are granted expressly subject to limitations declared by the settlement anterior to the first estate in tail male and to all powers thereto belonging. That clearly includes this power to appoint portions. As regards the other deed, so far as the mortgage was in exercise of the power of appointment reserved by the disentailing deed it was necessarily subject to this power of appointing further portions, and as regards the demise of the life estate this power of appointing portions did not take effect out of the life estate; and, further, having regard to the recitals, the intention of the parties was that the words in the demise "subject and without prejudice as aforesaid" should have the same meaning as they had in the disentailing deed, and this demise was therefore subject to the power to appoint portions. Reading the deed as a whole, the exercise of this power to appoint portions was not a derogation from the grant, but was entirely consistent with the deed itself.

Peterson, K.C., in reply. In Sugden on Powers, 8th ed. pp. 83, 619, *Scrope* v. *Offley* (1) is quoted in support of the general proposition that a covenant in a conveyance against incumbrances done or to be done will prevent the execution of the power in favour of a person having notice of the covenant. Chance on Powers, vol. ii. p. 591, is to the same effect, and the covenant in *Scrope* v. *Offley* (1) is there treated as an ordinary covenant for quiet enjoyment. The object of the covenant was to prevent the tenant for life from exercising any power which would put a further sum of money in front of the mortgage.

(1) 1 Bro. P. C. 276.

Butcher, K.C., in reply. Upon the fair construction of the Romney and Burmarsh mortgage the words "subject and without prejudice as aforesaid" refer to the immediately preceding matter, namely, "subject to the annuities charges mortgages and incumbrances hereinbefore referred to," and do not mean subject to all the powers conferred by the original settlement.

Cur. adv. vult.

Feb. 9. COZENS-HARDY M.R. The question in this appeal is whether a sum of 10,000*l.* charged by the will of Sir Edward Dering, who died in 1896, in exercise of a power contained in the settlement on his marriage in 1832 has priority over or is postponed to three mortgages for 18,000*l.*, 3600*l.*, and 6400*l.* executed in 1854. It is a question which can only be answered by a minute consideration of the precise terms of the various documents.

It is settled law that a power of this nature given to a tenant for life to charge the inheritance may be released not only by an instrument expressly releasing it, but by dealings manifestly inconsistent with its exercise. The donee of the power cannot be allowed to derogate from his own grant. This is the root principle which governs all cases of this nature. Many illustrations may be found in the reports, but I do not think it necessary to refer in detail to any case except the one which was so largely discussed before us, namely, *Scrope* v. *Offley*. (1)

The material facts were as follows. Robert Offley was tenant for life of certain estates in Derbyshire, with remainder to his son Stephen for life, with remainder to the first and other sons of Stephen in tail male, with remainders over; and Stephen had power to appoint any part of the settled estate not exceeding a moiety as a jointure for any wife for her life. By articles under seal dated May 17, 1700, to which Robert and Stephen were both parties, in contemplation of the marriage of Stephen with Urith Smith, Robert covenanted (inter alia) to settle upon Stephen and Urith for their lives one moiety of the estates to take effect upon his (Robert's) death and that the same should be settled on all the sons of Stephen and Urith successively in

(1) 1 Bro. P. C. 276.

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tail male, and it was agreed between all the parties that the other moiety should also be settled after the death of Robert upon Stephen for life and to his several sons in tail male successively. No mention was made in the articles of the power to jointure. In May, 1701, a settlement was executed in pursuance of the articles by which Robert and Stephen (who were only tenants for life) purported to convey the estates in the usual form of a strict settlement upon Stephen and Urith and their issue in tail male. And Robert and Stephen covenanted for title and that the estates should remain and continue to and for the uses of the settlement freed from all acts, estates, titles, charges, and incumbrances made, committed or done, or thereafter to be made, committed or done, by them or either of them. Urith died in 1711. Stephen married again in 1712, and in 1717 Stephen, being then tenant for life in possession, by deed limited to his second wife a jointure out of the settled estates. This jointure was, at law, a good execution of the power. But Lord King held that the son of Stephen and Urith was, by virtue of the articles and of the settlement, entitled to hold the estate discharged of the jointure claimed thereout by Stephen's second wife, and granted an injunction restraining her proceedings at law. And this decree was affirmed in the House of Lords. Lord Hardwicke in *Harvey* v. *Harvey* (1) says the case was decided upon the covenant in the first settlement, i.e., in the articles, and I think this is a clear and satisfactory ground of the decision. By agreeing under seal that the estates should go after his own death and the death of his wife Urith to the issue of the marriage in tail, Stephen by necessary implication agreed not to interpose a jointure in favour of his second wife, and the covenant in the settlement of 1701 not thereafter to make an incumbrance only followed this out. This seems to me to be nothing more than an example of an equitable release of the power, under the articles by necessary implication and under the settlement by express covenant. It does not justify the inference that ordinary covenants for title suffice to release the power if the property is in terms assured or appointed subject to the power. The presumption is strong that covenants

(1) Barn. Ch. 109, 112.

for title are only ancillary to the assurance and are not intended to enlarge its operation.

It remains to consider the various documents. [His Lordship referred to the settlement of April 7, 1832, and to the disentailing deed, and stated the facts down to the execution of the mortgages of November 18, 1854. He then referred to Fowke's mortgage, observing that Mrs. Apletre's mortgage was in similar terms, and continued :—]

Now on the construction of this deed it seems to me that Fowke took a security under the joint power only, and that such security was expressly subject to the powers annexed to the prior life estate of Sir Edward. I cannot agree that a further charge was created by this deed on Sir Edward's life estate. Fowke already had a security upon his life estate, and this security was expressly preserved. I think the true view is that the covenants for title did not enlarge the appointment or increase the extent and operation of the security. Covenants for title are really ancillary to the assurance of the property, and ought not, in the absence of clear words, to be extended so as to confer a larger estate than is expressly assured, and still more ought not to be so construed as to enable the grantee to claim property as free from charges or incumbrances to which in the operative part of the deed it is expressly made subject.

The mortgage for 6400*l.*, which is dated November 20, is in a somewhat different form. [His Lordship referred to the mortgage, and continued :—]

It will be observed that this mortgage plainly contains a disposition of Sir Edward's life estate and is not merely an appointment of the remainder in fee. It will also be observed that the covenant purports to free the property from charges already existing under the settlement of 1832.

Now it seems to me that this is a disposition by Sir Edward inconsistent with the exercise of his power, and therefore an implied release of his power so far as is necessary for the security of the mortgagees, unless a contrary conclusion can be reached on one or both of the following grounds.

(1.) The words "subject to and without prejudice as aforesaid" may mean, as undoubtedly they meant in the disentailing

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deed, subject to existing charges and incumbrances and without prejudice to the future exercise of the power to charge portions which had been expressly mentioned.

(2.) As the portions charge was created by Sir Edward's will, it could not take effect out of or in any way derogate from the demise of his life estate.

Upon the whole I think there is not sufficient to justify the inference that the power is released. There is a right of action on the personal covenant, both as to existing charges and as to this portions charge, but it is simply a right to be indemnified against them, and not a right to assert that the property shall be free from them.

I therefore think Neville J. was right in holding that the three mortgages are postponed to the portions charge of 10,000*l.* created by the will of Sir Edward.

The appeal must be dismissed with costs.

Fletcher Moulton L.J. has read this judgment and desires to say that he concurs with it.

BUCKLEY L.J. Subject to the yearly rent-charge of 1000*l.* limited to Lady Henrietta Geary for her life and to the term of 400 years for securing it, Sir Edward Cholmeley Dering was, under the settlement of April 7, 1832, tenant for life and donee of certain powers, including a power to charge the estates with a further sum of 10,000*l.* for younger children and a power of leasing and other usual powers. The remainders after his life estate were first to trustees for 300 years to secure Lady Jane Dering a jointure of 1200*l.* a year if she survived Sir Edward, then a term of 600 years to raise portions up to 20,000*l.* for children of their marriage, and subject thereto to the first and every other son of Sir Edward successively in tail male. There were also powers to jointure a future wife and to raise portions for children of a future marriage.

Prior to the estate tail there subsisted first the 400-year term to secure 1000*l.*, then the 300-year term to secure 1200*l.*, then the 600-year term to secure portions up to 20,000*l.*, and subject to those there was the power to raise the 10,000*l.* and the powers for the benefit of a future wife and the

children of a future marriage. The question for determination is whether Sir Edward, the donee of the 10,000*l.* power, by concurring in three mortgages which I will state, so acted either by way of grant or by way of covenant as to release the power in favour of the parties deriving title under the mortgages. The three mortgages in question are the Romney mortgage of November 18, 1854, in favour of Fowke, another mortgage of the same date, called the Burmarsh mortgage, in favour of Mrs. Apletre, and a third mortgage of November 20, 1854, called the Romney and Burmarsh mortgage, in favour of Gould, Pryor, and Wetherell. The two mortgages of November 18, 1854, are in all material respects identical. In each case the mortgagee was already mortgagee of Sir Edward's life estate, and the language of the two deeds is for the present purpose identical. In the third case, that of November 20, 1854, there was no previous mortgage of the life estate, and the language of the deed is not the same as in the other two cases. The decision in *Scrope* v. *Offley* (1), upon which so much reliance has been placed, is a decision simply, I think, to the effect that if before the exercise of the power there have been executed by the donee of the power a grant or covenant dealing with the property which is subject to the power the donee cannot subsequently so exercise the power as to derogate from his grant or to act in breach of his covenant; that the grant or covenant in such case is pro tanto in favour of the grantee a release of the power. Under these circumstances the decision of this appeal must rest upon an examination of the question whether Sir Edward Dering did by these mortgage deeds or any and which of them so grant or covenant as by virtue of this doctrine to release the power in favour of the mortgagees.

On October 30, 1854, Sir Edward and his son Mr. Edward Dering had concurred in a disentailing assurance. That deed had at page 3 of the copy before me recited the 10,000*l.* power to raise portions, and the father and son had concurred in granting the settled estates subject to the estates created by the settlement prior to the first estate tail and subject to all powers to such estates belonging, with an habendum "subject nevertheless

(1) 1 Bro. P. C. 276.

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and without prejudice as aforesaid," in such manner as to disentail the property and to create a joint power of appointment in father and son and subject thereto to resettle it. A proper understanding of the expression in this deed "subject nevertheless and without prejudice as aforesaid" is material for a purpose which will appear when I come presently to construe the third mortgage. The word "prejudice" had not been used in the deed until it is here used in the expression "without prejudice as aforesaid," but there is no room, I think, for doubt as to its meaning. The words "subject nevertheless and without prejudice as aforesaid" as they occur in this deed mean subject to the estates, &c., created by and without prejudice to the powers exercisable under the settlement. That disentailing deed having been executed in October, the first two securities are then executed on November 18, 1854. In these deeds there is a recital of an agreement between father and son on the one hand and the mortgagee on the other that, for the purpose of further securing the mortgagee, who already held a mortgage upon the life estate, the father and son should execute their joint power of appointment. The recital is one which shews that the security which the mortgagee is to get is a security taking effect under the joint power and in no other way. The testatum then is that the father and son, in exercise of the joint power, appoint to the mortgagee subject to the 400 years' term and subject to the uses, limitations, trusts, and estates by the settlement of 1832 and a supplemental settlement of May 5, 1832, created and declared anterior to the first estate tail and to all powers to such uses, limitations, trusts, and estates belonging or annexed or exercisable in respect thereof. In other words, the security is simply given by the exercise of the joint power of appointment and subject to all the limitations and powers which take effect before that joint power, subject, that is, to the three several terms of 400 years, 300 years, and 600 years, and to the power to raise 10,000*l.* further portions. Then follow covenants. They are joint and several covenants, but they are such joint and several covenants as you would expect under the circumstances where father and son were executing such a joint power as here exists. There is a separate covenant by the father that the mortgagee shall

occupy and enjoy without disturbance by him free and clear of and released and discharged or otherwise by him indemnified against a number of things, including former and other gifts . . . . leases . . . . jointures, portions, and especially the particular jointure and portions which are mentioned in the settlement. This clause is, I think, to be read reddendo singula singulis. Sir Edward does not, for instance, covenant that the mortgagee shall hold free from the jointure and portions which by virtue of the settlement have priority, nor from a lease granted under his power of leasing, nor, in my opinion, from a portion granted by way of exercise of the 10,000*l.* power. The covenant extends to former *and other* portions, inferring that there may be future portions, and as regards such the covenant is not to release or procure the release of such, but either to release or indemnify. It is a covenant, I think, which contemplates that the power of leasing, the power of granting portions, and so on, are kept alive, and that if exercised the covenantor will indemnify the mortgagee against the further charge which will thus come before him.

The third mortgage, that of November 20, 1854, recites at page 3 the power to charge with the 10,000*l.*, further portions. It recites the disentailing deed, including the language upon which I have already commented, in which the expression "subject nevertheless and without prejudice as aforesaid" occurs. It then recites an agreement to give security by an exercise of the joint power. The witnessing part consists of an appointment made by the father and son to the mortgagee. Then follows a second testatum, and thereby the father and son do and each of them doth grant and demise. Here is a substantive independent grant by way of demise made by the donee of the power. But it is made to hold to the mortgagees "subject to and without prejudice as aforesaid." Those words in this context mean, I think, what they mean in the disentailing deed. The mortgagees are to take subject to the existing estates, and so on, and without prejudice to the powers. There follow covenants, including a several covenant by the father for right to demise and that the mortgagees shall enjoy free and clear, and so on, in language similar to that upon which I have commented in the other

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mortgage. The words "former and other gifts leases portions," and so on, are exactly the same as in the deeds of November 18. In this deed also it seems to me that the donee of the power has not by his demise expressed himself to grant except "subject to and without prejudice as aforesaid," and his covenants, as in the other case, are covenants contemplating the existence of future portions and covenanting to indemnify against them. In no one of the deeds, therefore, do I find either by way of grant or by way of covenant that the tenant for life has so acted towards the mortgagee as to release the power. From this it results that the portions have priority over the mortgages and that this appeal must be dismissed.

Solicitors: *Atkey, Clarke & Atkey; Bridges, Sawtell & Co.; Patersons, Snow, Kinder & Lawson.*

H. B. H.

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In re DISCOVERERS FINANCE CORPORATION, LIMITED. LINDLAR'S CASE.

[00199 of 1906.]

Company — Winding-up — Contributory — Transfer of Shares to escape Liability — Validity — Transfer out and out — Power of Directors to Refuse Registration.

Where the articles contain no clause authorizing directors to reject a transferee, a shareholder may up to the last moment before liquidation, and for the express purpose of escaping liability, transfer his partly-paid shares to a transferee, even though he be a pauper, and may compel the directors to register that transfer, provided it be an out and out transfer reserving to the transferor no beneficial right to the shares direct or indirect. Whether the transfer is of that character is a question of fact.

Hyam's Case, (1859) 1 D. F. & J. 75; *Costello's Case*, (1860) 2 D. F. & J. 302; and *Budd's Case*, (1861) 3 D. F. & J. 297, discussed and explained.

Lund's Case, (1859) 27 Beav. 465, overruled.

Where the articles contain a clause empowering the directors to reject a transferee whom they do not approve, the transferor cannot escape liability if he has actively or passively induced the directors to pass and register a transfer (even though it be an out and out transfer) which, but for his conduct, they would have refused to register. Here again the question is one of fact.

Whether the articles do or do not contain a clause authorizing the

directors to refuse registration, the transferor cannot escape liability where he has obtained the advantage of executing and registering his transfer upon an opportunity obtained by him fraudulently or in breach of some duty which he owed the corporation.

Decision of Neville J., ante, p. 207, affirmed.

In re Discoverers Finance Corporation, [1908] 1 Ch. 141, overruled.

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APPEAL from a decision of Neville J. (1)

The question raised by this appeal was whether a transfer to a pauper of partly-paid shares in a limited company, with the avowed intention of escaping further liability, was valid as against the liquidator in a subsequent winding up of the company.

In June, 1896, the Discoverers Finance Corporation, Limited, was incorporated for the purpose of carrying on all kinds of mining and finance business. Max Lindlar had subscribed for 2000 shares and paid up 7*s.* 6*d.* per share. He was resident, and engaged in business, in London. From the beginning of the year 1900 onwards the company did no business, except that it was interested jointly with the Universal Corporation, Limited, in some mining or prospecting operations carried on by that company in Canada on the joint account at a loss.

In 1904 Max Lindlar, owing to something he heard from persons interested in the company, became very anxious to get rid of the liability on his shares. He tried to find a purchaser in England, but failed. He then applied to his brother-in-law, Otto Dahl, who was carrying on business at Barmen, in Germany, to find him a purchaser, saying he would sell the shares for 5*l.* Otto Dahl, with the assistance of his brother, Hugo Dahl, brought the matter before Otto Schneider, a journeyman tanner, who had been forty years in the employment of Otto Dahl, or his father, at the average salary of 40 marks a week, and he agreed to purchase the shares for 100 marks. Otto Dahl informed Lindlar of this, and, as the judge held, Lindlar filled up a transfer in the usual form to Otto Schneider, who was described merely as "of Barmen, Germany," the consideration being 5*l.* This transfer was sent out to Germany, duly executed by Otto Schneider, and returned to Max Lindlar, who sent it in for registration and paid

(1) Ante, p. 207.

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the registration fee and stamp. The directors had an absolute power to refuse to register transfers. The transfer was passed without opposition at a board meeting held on February 3, 1905, together with several others, one of which was set aside as fraudulent by Parker J. in *In re Discoverers Finance Corporation.* (1) On March 16, 1906, the company went into voluntary liquidation.

The liquidator subsequently took out a summons to rectify the list of contributories by substituting the name of Max Lindlar for that of Otto Schneider in respect of these 2000 shares.

Max Lindlar had been examined before the liquidator, and he and the directors and secretary of the company were cross-examined at the hearing of the summons, and the Messrs. Dahl and Otto Schneider had been examined by commission in Germany. The purchase money of 5*l.* (100 marks) was never paid or asked for. The explanation given for this was that Otto Schneider had shortly after the transaction met with a serious accident and been crippled for life.

The result of this evidence is stated and considered in the judgment of the Court of Appeal.

Neville J. held, upon the evidence, that the transfer to Schneider was an out and out transfer, without any undertaking or arrangement that Schneider should be indemnified against loss by the Dahls or by Lindlar, and that the registration of the transfer was not obtained collusively by Lindlar or by misrepresentation; and he also held that, though the transaction as between the transferor and transferee was voidable, the liquidator was not entitled to stand in the shoes of the transferee and enforce in the liquidation any equities that he might have against the transferor; he accordingly dismissed the summons.

The liquidator appealed.

Younger, K.C., and *Maugham*, for the appellant. The evidence shews a great desire on the part of Lindlar to get rid of his liability on these shares at any price: this was not a genuine sale. Considering the position of the parties it is impossible to

(1) [1908] 1 Ch. 141.

believe that Schneider would have been allowed to suffer, and there must have been an intention that Messrs. Dahl or Lindlar should keep him indemnified. No money was in fact paid for the transfer. This case is similar to Cooper's case in the same company: *In re Discoverers Finance Corporation* (1), where Parker J. held that the transfer was not made bona fide.

The onus is on the transferor to shew that the transfer is bona fide: *Costello's Case.* (2) The principles laid down in *De Pass's Case* (3) are in favour of the appellant. If, as part of the bargain, there existed between the transferor and transferee an obligation in the transferor to indemnify the transferee, then the transferor remains liable: *Ex parte Hatton.* (4) The result of the evidence here is that the transferee, at the request of the transferor, accepted a voluntary transfer, thus becoming a trustee for the transferor. In *Budd's Case* (5) the facts were very like those of the present case, and the transferor was held to be a contributory. *Lund's Case* (6) is in our favour. That case has never been overruled.

The present case is distinguishable from *Slater's Case* (7) and *Masters' Case.* (8)

Even if the transfer is out and out, the transferor will not escape liability, if the registration of the transfer has been obtained by misrepresentation as to the position of the transferee, as in this case: *Payne's Case* (9); *Williams' Case.* (10) Here there is a false statement on the face of the transfer and an insufficient description of the transferee. No money passed, and none was asked for; misrepresentation as to the consideration for the transfer was held to be proof of misrepresentation in *Ex parte Kintrea.* (11)

The directors were misled when passing this transfer. The description of Schneider as of "Barmen, Germany," implies that he was a man of business or position for whom that address was sufficient, when in fact he was a journeyman tanner.

(1) [1908] 1 Ch. 141.
(2) 2 D. F. & J. 302.
(3) (1859) 4 De G. & J. 544, 558.
(4) (1862) 31 L. J. (Ch.) 340, 343.
(5) 3 D. F. & J. 297.
(6) 27 Beav. 465.
(7) (1866) 35 Beav. 391.
(8) (1872) L. R. 7 Ch. 292.
(9) (1869) L. R. 9 Eq. 223.
(10) (1869) L. R. 9 Eq. 225, n.
(11) (1869) L. R. 5 Ch. 95.

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[Buckley on the Companies Acts, 7th ed. p. 39, was also referred to.]

Rawlins, K.C., and *Douglas Hogg*, for Lindlar, were not called upon.

COZENS-HARDY M.R. We will consider our judgment, and if we wish to hear counsel for the respondent we will let them know. (1)

Cur. adv. vult.

Feb. 12. The judgment of the COURT (Cozens-Hardy M.R., Fletcher Moulton L.J., and Buckley L.J.) was delivered by

BUCKLEY L.J. The following is the judgment of the Court. The decisions upon the branch of the law with which we are here concerned are numerous. Care is necessary to avoid the danger which exists of allowing the attention to be distracted from the principles which underlie all those decisions, and to be drawn into an examination of the minute differences of fact and inferences of fact upon which judges have in different cases acted in forming their conclusions as to the facts to which they are about to apply those principles.

We propose first to state the principles as we understand them. By s. 22 of the Companies Act, 1862, which is reproduced as s. 22 of the Companies (Consolidation) Act, 1908, it is provided that the shares in a company under these Acts shall be capable of being transferred in manner provided by the regulations of the company. The regulations of the company may impose fetters upon the right of transfer. In the absence of restrictions in the articles the shareholder has by virtue of the statute the right to transfer his shares without the consent of anybody to any transferee, even though he be a man of straw, provided it is a bona fide transaction in the sense that it is an out and out disposal of the property without retaining any interest in the shares—that the transferor bona fide divests himself of all benefit. If authority be wanted for a proposition so familiar it is to be found in the language of Page Wood L.J. in *Weston's Case.* (2)

(1) No argument on the part of the respondent was required.

(2) (1868) L. R. 4 Ch. 20, 27.

It was the policy of these Acts to give a free right of disposition, leaving it to the regulations of the company to impose such restrictions upon its exercise as might be desired. In the absence of restrictions it is competent to a transferor, notwithstanding that the company is in extremis, to compel registration of a transfer to a transferee notwithstanding that the latter is a person not competent to meet the unpaid liability upon the shares. Even if the transfer be executed for the express purpose of relieving the transferor from liability, the directors cannot upon that ground refuse to register it unless there is in the articles some provision so enabling them.

The cases which are generally regarded as the leading cases upon this branch of the law are cases decided before 1862. *De Pass's Case* (1) is the one ordinarily quoted as establishing the proposition that if partly-paid shares are absolutely and bona fide parted with out and out, without any trust for the benefit of the transferor, or any reservation whatever, the transferor is relieved from liability. That was a case of a company which had issued scrip certificates to bearer certifying that the holder on making certain payments would be entitled to certain shares, and in that and the similar cases in the same company it was assumed (whether rightly or wrongly is immaterial for the present purpose) that the delivery of the certificate was a transfer of the share. In other words, *De Pass's Case* (1) and the other cases in the same company were cases in which the right to transfer rested not upon the statutory provision which has been mentioned, but upon such rights as arose upon the delivery of an instrument by whose delivery the shares were taken to pass. In the subsequent cases since 1862 (and they have been numerous) we do not remember that reference was made to the difference which arises by reason of the fact that the right to transfer is in cases under the Companies Acts a statutory right. It is a difference which in our judgment gives the transferor a greater right if that be necessary than existed in such a company as was the subject of the decision in *De Pass's Case.* (1)

In that which follows the authorities are divided into three classes.

(1) 4 De G. & J. 544.

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The first is the case where the articles contain no clause allowing the directors to reject a transferee. In such case the law is that a shareholder may up to the last moment before liquidation, and for the express purpose of escaping liability, transfer his partly-paid shares to a transferee, even though the latter be a pauper, and may compel the directors to register that transfer made avowedly for the purpose of avoiding liability, provided his transfer be an out and out transfer reserving to himself no beneficial right to the shares, direct or indirect. Whether the transfer is of that character is a question of fact. The decisions have varied only so far as that fact is found in the one direction or in the other. In *De Pass's Case* (1) it was found as a fact that the transfer was bona fide out and out. In *Hyam's Case* (2) it was found as a fact that it was not. Upon the last-mentioned case it is well to pause to say a word upon the question of why in these cases it is material whether the transferee is or is not a trustee for the transferor. It is familiar law that a man may transfer his shares to a trustee for himself, and that in such case the transferee will become and the transferor will cease to be, as between those parties and the company, the person liable upon the shares. But if such a transfer be made for the purpose of escaping liability in circumstances such as are here in contemplation, the transaction fails to relieve the transferor from liability, because he is not really availing himself of his statutory right to transfer his shares and be quit of both benefit and burden, but is attempting to transfer them so that he retains the benefit but rejects the burden. To use the language of Turner L.J., the trust in such case is one which upon the real facts, if created at all, was created for the fraudulent purpose of covering the real ownership, and was not a trust which the Court could recognize or act upon. The Lord Justice is not, of course, here addressing himself to the case of the statutory right to transfer, for the case was not under the Act. But the same principle is applicable under the Act. The reason why the transferor in such case is not discharged is that he is not doing that which the Act allows, namely, parting with both benefit and burden, but is purporting to do one thing and in

(1) 4 De G. & J. 544. (2) 1 D. F. & J. 75.

fact doing another. *Costello's Case* (1), again in the matter of the same company, is not in conflict with the principle of the cases already mentioned, if it be borne in mind that both judges rest their decision upon the fact that there was not an out and out transfer. Knight Bruce L.J. says that there was "No real bargain, no true contract." Turner L.J. relies upon the fact that a broker was employed "to give the transaction a more honest appearance." From these expressions we are entitled to infer that both the Lords Justices thought that the transfer was not an out and out transfer. If this be not the ratio decidendi, *Costello's Case* (1) is, we think, in conflict with the other authorities and cannot prevail against them. *Budd's Case* (2) was decided as it was upon the ground that the transferor had offered to contribute a sum to escape further liability, a fact which Turner L.J. took to amount to an admission that the shares belonged to him and not to the transferee, and Knight Bruce L.J. stated that the case appeared to him not to be one of vendor and purchaser. There is one case, *Lund's Case* (3), before Sir John Romilly, which was not rested upon the grounds which seem to us the true grounds. In our judgment *Lund's Case* (3) was wrongly decided. It is not necessary to go on through the many subsequent cases which illustrate the principle. In none of them is there any principle to be found enunciated other than that above stated. The cases all turn upon the question of fact whether there was or was not such an out and out transfer as above described.

Counsel for the appellants pressed us with an argument that, if as part of the bargain there existed between transferor and transferee an obligation in the transferor to indemnify the transferee, then the transferor is liable. We are not aware of any authority for that proposition. The only case referred to in support of it was *Ex parte Hatton* (4), a decision of Page Wood V.-C. It does not support the contention. It was a case in which the directors had refused to register a transfer until the transferor should have paid a call already made. The Vice-Chancellor found that the transaction was one under which a

(1) 2 D. F. & J. 302, 307, 309.
(2) 3 D. F. & J. 297.
(3) 27 Beav. 465.
(4) 31 L. J. (Ch.) 340.

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transferee had been discovered who for 2*l.* 10*s.* was willing to submit to become liable for a debt of 250*l.*, with all the consequences which might ensue from that position. He held that there was no intention that any property should be transferred, and went on to rely upon the contract to indemnify as a circumstance which guided him in arriving at that conclusion. It is unquestionably the law that in cases such as the present the transferor may pay the man of straw a sum of money as the price of becoming the transferee. If he may pay him 2*l.* 10*s.*, why may he not covenant that in the event of his being made liable he will indemnify him to the extent of 2*l.* 10*s.*? We fail to see upon principle why he may not covenant to indemnify to a limited extent or altogether in respect of the transaction. What he must not do is to reserve the benefit—there is nothing in principle to forbid his keeping the burden. It may, of course, be a most material circumstance in determining whether the transferor has reserved the benefit that he has by a covenant of indemnity left himself exposed to the burden. In that sense the existence of a covenant to indemnify is most material. But the liability of the transferor in every case arises not from the fact that he has paid or become liable to pay something to the transferee, but upon the fact that he has reserved to himself a benefit in respect of the shares. If that be found not to be the case, then the transfer to a man of straw is effectual to protect the transferor.

The investigation whether the transfer is or is not an out and out transfer is, of course, an investigation of the true relations subsisting between the transferor and the transferee. But if this inquiry is answered by finding that the transfer is out and out, there is in the absence of an approval clause in the articles, and in the absence of facts which bring the case within the third class presently mentioned, an end of the matter so far as any rights of the liquidator are concerned. Suppose the out and out transfer was procured by misrepresentation practised by the transferor towards the transferee. This will give the latter rights against the former, but with these the liquidator is not concerned. He has no right arising from this cause of action, assuming it to exist as between the other

parties. If the transferee initiates against the transferor successful proceedings, the liquidator no doubt can and ought to give his sanction under s. 131 of the Act of 1862, or s. 205 of the Act of 1908, if the result will be that he will obtain as contributory a solvent transferor in place of an insolvent transferee. But in such case the result is attained not by virtue of any right subsisting in the liquidator, but by the liquidator consenting to the successful assertion of a right subsisting in some one else. In *In re Discoverers Finance Corporation* (1) Parker J. expressed the opinion that the liquidator could set up such equities. In our opinion that is erroneous. We do not understand *Budd's Case* (2) in the sense in which Parker J. understands it. The passage from the judgment of Knight Bruce L.J., which Parker J. reads, is a passage which results in the conclusion by the Lord Justice that the case was not one of vendor and purchaser. He was using the facts which he was mentioning, not in order to shew that the liquidator could assert equities to which the company was no party, but for the purpose for which they could legitimately be regarded, namely, to see whether the transfer was out and out. If the transfer be once found to be an out and out transfer, there is, in the absence of restrictions in the articles and in the absence of facts which bring the case within the third class, an end of the matter so far as the rights of the liquidator are concerned.

The second class of case is where the articles do contain a clause empowering the directors to reject a transferee whom they do not approve. In these cases the principle is that the transferor cannot escape liability if he has actively by falsehood, or passively by concealment, induced the directors to pass and register a transfer (even though it be an out and out transfer) which, if he had not so deceived or concealed, they would have refused to register. Here again the question is one of fact. It is not sufficient to shew that the transferee's address was incorrect or that the description of his occupation was not accurate, or the like. The Court must arrive at the conclusion that therefrom resulted such a state of things as that if the directors had known the truth they would not have registered the transfer.

(1) [1908] 1 Ch. 141. (2) 3 D. F. & J. 297.

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The third class of case is one which may arise in either one of the two classes of case above mentioned. It is the case in which the transferor has obtained the advantage of executing and registering his transfer to a man of straw upon an opportunity obtained by him fraudulently or in breach of some duty which he owed the corporation. As, for instance, if he (being in a position so to do) have procured the postponement of the commencement of the winding-up in order to get time to execute and tender such a transfer for registration, or if by collusion with the directors he has procured them in breach of their duty to pass a transfer which they ought not to have passed. The last is a ground which might have been material in the present case if it had been proved, which it has not, that Gretton approved the transfer collusively with Lindlar in breach, as Lindlar knew, of his duty to the company. The liquidator tried to make that case and failed in respect of it.

It remains to find the facts of this case, and to apply to them the principles which have been stated. The articles of association contained in article 22 a provision that the board might decline to register a transfer of shares not fully paid to a transferee whom they did not approve. We have therefore to inquire first whether the transfer was out and out, and secondly, if it was, then further whether the registration of the transfer was obtained under circumstances which were not fair as between the transferor and the company. Lindlar, the transferor, was a man of substance. He had taken 2000 shares and had paid 750*l.* upon them. He was anxious as to the position of the company and as to his liability of 1250*l.* He was bona fide desirous of parting with his holding for a nominal consideration, or was prepared even to pay some one to take his shares. He had bona fide the intention of freeing himself from the liability of 1250*l.*, and to achieve that result was prepared to give up all benefit in the shares. He failed to find a transferee in England, but found one in Germany. The transferee was to pay him 5*l.*, a merely nominal sum. This sum was never in fact paid. Lindlar paid both the transfer fee and stamp; he sent in a transfer in which he described the transferee as "Otto Schneider, Barmen, Germany." The transferee's signature was attested by "Hugo

Dahl, Viktorstr., Barmen." In Barmen there were resident three Dahls—Alexander, the father, and Otto and Hugo, his two sons. Otto was Lindlar's brother-in-law. The liquidator has sought to make much of a suggestion that Lindlar, at his examination under s. 115, withheld information as to Otto, his brother-in-law, and said that the transferee was procured by Hugo. The matter is quite immaterial, except so far as it goes to Lindlar's credibility. The transferee, Schneider, was found by Otto, Hugo, or one of them, and was deliberately sought as a person who would accept the liability of which Lindlar was anxious to divest himself. We are further satisfied upon the evidence that Lindlar intended that Schneider should take the whole benefit of the shares, and that Schneider accepted the liability because the risk of the position was of no moment to him, and there was a possibility of the event turning in his favour and his becoming, as he said, a rich man. In a word, we are satisfied upon the evidence that this was an out and out transfer in which Lindlar was parting with the benefit as well as the burden.

But it remains to see whether the registration of this out and out transfer was obtained unfairly as between Lindlar and the corporation. The points relied upon are that the consideration of 5*l.* was not paid, that Lindlar paid the transfer fee and the stamp, that the transferee was not described as a journeyman tanner, and that his address by street and number was not given in the transfer. These were shares upon which 750*l.* had been paid. There is no evidence as to what was their value, if any, but the sum of 5*l.* must have been taken by the directors as being a nominal consideration. As regards any materiality of the absence of a description of the transferee by occupation and address, the liquidators have filed affidavits of Robertson, who was a director, and is now one of the liquidators of the company, and of Sanderson, who at the relevant time acted as secretary, and of Hobson, another director. They were present when the transfer was passed. Gretton, the third director and chairman, who was the only other director present, was called before the judge in a position which we do not quite understand, not as any one's witness, but to be cross-examined by both sides. He was cross-examined on the part of the liquidator. Robertson and

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Sanderson, by affidavits filed by the liquidator, state that they spoke to Gretton, the chairman, about the transfer, and pointed out that it was in respect of partly-paid shares, and asked whether it was in order, and whether he had inquired into the standing of the transferee, and that Gretton said he was quite satisfied. Hobson says that to the best of his belief he asked the chairman or secretary at the board meeting whether the transfer was in order. He adds that if he had not been misled (not stating in any way how he was misled) he would not have passed the transfer. Lindlar, by his affidavit, says he never misled the directors in any way. Gretton, on cross-examination, said that the statements of Robertson and Sanderson were not accurate, but agreed that the directors were satisfied, attributing their satisfaction to the result of information given by the secretary. The liquidator has adduced no evidence whatever, other than the paragraph of Hobson's affidavit above referred to, that if the directors had been informed that Schneider was a journeyman tanner, or had known his address, the knowledge would have modified their action in any way. It would, of course, have been competent to the directors before approving the transfer to have called upon Lindlar for further information as to his transferee, or to have communicated with the attesting witness. Had they done so, and had they received false information, that would have been most material. They did nothing of the sort. There is no evidence that by falsehood or by concealment Lindlar induced the directors in any way to pass the transfer. Upon this state of facts we think that, first, the transfer was out and out, and, secondly, the company were bound by the action of their directors, who in the matter of applying article 22 were the proper authority to act in the matter.

For these reasons we think that this appeal fails and should be dismissed with costs.

Solicitors: *Dunderdale, Dehn & Co.; Clarke, Rawlins & Co.*

W. C. D.

WILLÉ *v.* ST. JOHN.

[1908 W. 816.]

C. A. 1910 Feb. 4.

Vendor and Purchaser—Restrictive Covenants—Building Scheme—Right of Purchasers inter se—Land Transfer—Registration—Conditions annexed to Title—Land Transfer Act, 1875 (38 & 39 *Vict. c.* 87), *s.* 84—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *Sched. I.*

In 1903 fourteen acres, forming part of the D. estate, were conveyed to Holmes, who covenanted with the vendor and the owner for the time being of the estate to observe certain restrictive conditions under which only dwelling-houses were to be built on the land, so as to bind the hereditaments thereby conveyed into whosesoever hands the same should come. Holmes caused himself to be registered in the Land Registry as proprietor of the fourteen acres. The restrictive conditions were not entered at that time, but on April 6, 1905, they were entered on the register as affecting the whole of the land comprised in the title. On the same day Holmes transferred a plot of land, forming part of the fourteen acres, to the plaintiff, who covenanted to observe the conditions. In 1907 Holmes conveyed the plot adjoining the plaintiff's plot to four purchasers, who built a church thereon. The plaintiff brought an action against Holmes and the four purchasers for an order directing them to pull down the church, and for damages:—

Held, that the registration of the restrictive conditions did not entitle one purchaser from Holmes to enforce the conditions against another purchaser or against the common vendor, in the absence of proof of a building scheme, and that the action failed.

Decision of Warrington J., ante, p. 84, affirmed.

Appeal of the plaintiff from a decision of Warrington J. (1)

For the purposes of the appeal the facts appear sufficiently from the head-note.

Francis Watt, for the appellant. Holmes having put upon the register the restrictions imposed by the covenant in the deed of 1903 and having sold a part of the land to the plaintiff, the plaintiff is entitled by virtue of that entry upon the register to enforce these restrictions against his vendor and people deriving title from him. The effect of registration is to attach these conditions to the land: Land Transfer Act, 1875, s. 84, as amended by the First Schedule to the Land Transfer Act, 1897 (2); *Ground*

(1) Ante, p. 84.

(2) In that schedule as printed, the number 84, which should stand in the first column corresponding to the words "annexation of conditions to land" in the second column, seems to have dropped out.

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Rent Development Co. v. *West.* (1) Further, the plaintiff is entitled on the footing of there being a building scheme. Apart from s. 84 it must be admitted that the evidence fails to establish a building scheme, but the plaintiff is entitled for the purpose of establishing a building scheme to pray in aid the provisions of that section.

[Counsel also referred to *Reid* v. *Bickerstaff.* (2)]

Rowden, K.C., and *A. Adams*, for the respondent Holmes, and *P. F. S. Stokes*, for the other respondents, were not called upon to argue.

COZENS-HARDY M.R. In my opinion the judgment of Warrington J. in this case is perfectly right. The question really turns upon the true construction of s. 84 of the Land Transfer Act, 1875. In order to deal with that section one must remember that at the date of that enactment it was settled law that restrictive negative covenants could be imposed upon land which would bind not merely the covenantor, but persons claiming under the covenantor with notice of the covenant. One must remember further that it was also settled law that a mere covenant of that kind did not confer any rights as between purchasers from the covenantor unless what was called a building scheme was made out. Then the object of s. 84, which provides for the registration of titles, was to enable a man who buys land as to which restrictive covenants have been entered into to put notice of the conditions imposed by the covenants on the register; and ordinarily it is his duty to do so. But the suggestion that s. 84 creates a condition merely by putting something on the register is entirely without foundation and goes altogether beyond the scope and object of the section. The section, reading it shortly, says "Where any land is about to be registered, or any registered land is about to be transferred to a purchaser for valuable consideration, there may be annexed thereto a condition that such land or any specified portion thereof is not to be built on, or is to be or not to be used in a particular manner, or any other condition running with or capable of being legally annexed to land, and the first proprietor and every transferee, and every

(1) [1902] 1 Ch. 674. (2) [1909] 2 Ch. 305.

other person deriving title from him, shall be deemed to be affected with notice of such condition." That was amended by the Land Transfer Act, 1897, Sched. I., which says that that condition may be annexed to the land at any time. That is to say, you may have a case in which a man is a registered owner and he may enter into a covenant with his neighbour that certain things shall not be done on the land, and notice of that may be put on the register; or again you may have a case in which a man who has entered into a restrictive covenant is on the register without any condition, and he may subsequently put on the register the condition imposed by the covenant as a condition annexed to the land. In the present case Holmes has entered into a restrictive covenant with the owners of the Du Cane estate. Holmes bought a plot of land of fourteen acres. In his first registration no notice was put on the register of this restrictive covenant—whether at the suggestion of the registrar I know not and care not—but Holmes, being minded to do that which in my opinion it was clearly right for him to do, on April 6, 1905, caused to be entered on the register the fact of the existence of the restrictive conditions, which were binding as between himself and the Du Cane trustees. That was notice that those conditions did affect the land as between Holmes and the Du Cane trustees or persons claiming under them. But to say that the effect of this registration was to constitute a building scheme or to entitle any one purchaser from Holmes to assert against another purchaser or against Holmes that the land ought to be as between them subject to these conditions is to go beyond anything to be found in the section and is inconsistent with every principle of law. It would be a most serious blot upon the Registration Acts if by merely giving notice of conditions of this kind the landowner were to produce the same consequences as would have followed in case there had been a building scheme. Then it is said that there is something in the judgment of Kekewich J. in *Ground Rent Development Co.* v. *West* (1) which assists the plaintiff. I cannot myself find anything of the kind. There upon a purchase of land certain restrictions affecting the

(1) [1902] 1 Ch. 674.

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land had been imposed by covenant upon the purchaser, and an application was made to the Court under the concluding words of s. 84 of the Land Transfer Act, 1875, to release those restrictions on the ground that it would be beneficial to all parties. That case lends no colour to the suggestion that the mere entry of the fact, which is the truth, that the land was subject to these conditions as between Holmes and the Du Cane trustees was to make the land subject to the same conditions as between one purchaser and another purchaser from Holmes.

FLETCHER MOULTON L.J. I am of the same opinion. I think that s. 84 was not intended to extend the right of one purchaser against another where there are no contractual rights between them. I think it was only intended to make an entry on the register of restrictive covenants as effective in every way as notice of the covenants would have been.

BUCKLEY L.J. I agree.

Solicitors: *Webster & Webster; Clowes, Hickley & Steward; Fooks, Chadwick, Arnold & Chadwick.*

H. B. H.

[1910] 1 Ch. 329. *In re* CURRIE'S SETTLEMENT. | *Distinguished. In re* PLAYFAIR, DECD. [1951] 1 Ch. 4

In re CURRIE'S SETTLEMENT.

In re ROOPER.

ROOPER *v.* WILLIAMS.

JOYCE J.

1909

Dec. 1.

1910

Jan. 14.

[1909 C. 1796.]

Will—Construction—Share of Residue—Absolute Gift—Subsequent Provision for Settlement of Married Daughter's Share—Trusts by Reference to Marriage Settlement—"Subsisting and capable of taking effect"—Default of Issue—Ultimate Trust for Testator, "his executors administrators and assigns"—Daughter absolutely entitled.

The testator gave his residuary estate to trustees upon trust for his children living at his decease as tenants in common, and then directed that the share which "would belong to" any daughter who at his death should be or have been married should "go and be paid to" the trustees of her marriage settlement, to be held upon the same trusts as were thereby declared of the moneys thereby settled by him upon such daughter or such of them as should be then subsisting and capable of taking effect.

The ultimate trust of the moneys settled by the testator upon the marriage of his daughter, Mrs. C., who survived him and her husband, was a trust in default of issue of Mrs. C. (as happened) for the testator, his executors, administrators, and assigns:—

Held, that in the events which had happened there was no valid effective trust declared by the testator's will of Mrs. C.'s aliquot share of residue upon her death without having issue, and that the share devolved upon her legal personal representative.

The rule in *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 551, applied.

ADJOURNED SUMMONS.

By his will, dated July 28, 1854, John Bonfoy Rooper, the above-named testator, devised the residue of his real and personal estate upon trust for sale and conversion and directed his trustees to stand possessed of the net proceeds arising therefrom and of the moneys belonging to him at his death upon trust, subject to the payment of his debts, funeral and testamentary expenses, and legacies, for all and every his child and children (except his eldest son, Bonfoy Rooper) who should be living at his decease and who should attain the age of twenty-one years as tenants in common, with a provision for the issue living at the testator's death of any child who should die in his

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lifetime after the date of his will And the testator directed that the share of and in the said trust funds which under the trust or provision lastly thereinbefore contained "would belong" to any daughter of his who at the time of his decease should be or have been married should "go and be paid" to the trustees or trustee for the time being of the settlement made on the marriage of such daughter and be held by them "upon the same trusts and for the same intents and purposes and with under and subject to the same powers provisoes declarations and agreements as in such settlement are declared or contained of or concerning the moneys thereby settled by me upon such my daughter or such of them as shall be then subsisting and capable of taking effect."

The testator died in 1855, leaving twelve children (other than his eldest son) surviving him, including Mrs. Currie, a married daughter, whose husband died in 1860, and who herself died in 1909 without ever having had issue.

By the settlement made upon the marriage of Mrs. Currie in 1834, to which settlement the testator was a party, the ultimate trust in default of issue of Mrs. Currie of the fund thereby settled by him upon his daughter was "in trust for the said John Bonfoy Rooper his executors administrators and assigns to and for his and their own use and benefit and to be retained or paid to him accordingly."

The surviving trustee of Mrs. Currie's marriage settlement took out this summons for the determination of the question who was entitled to the funds in his hands representing her share in the testator's residuary estate which had been transferred by the trustees of the testator's will to the trustees of her settlement.

Austen-Cartmell, for the plaintiff, stated the case.

P. F. Wheeler (*Hughes, K.C.*, with him), for Mrs. Currie's executor. The settlement by which the original absolute gift of a share of residue to Mrs. Currie was sought to be restricted having failed, the absolute gift remains, and Mrs. Currie's estate is entitled to her share: *Lassence* v. *Tierney* (1); *In re*

(1) 1 Mac. & G. 551.

Hancock (1); *Hancock* v. *Watson*. (2) There was an effective distribution of the testator's estate with a complete severance of the share of each child for all purposes, and it was not intended that any part of it should come back.

Ashworth James (*Younger*, *K.C.*, with him), for the representatives of one of the testator's residuary legatees entitled absolutely. The testator had an estate of his own in possession and also a reversion under Mrs. Currie's marriage settlement expectant on her death and in default of her issue. He directed a sale of his property which included the reversion, and it ought to have been sold. He gave a share of his residue to Mrs. Currie to be held on trust for her for life, and after her death and in the events which have happened it was to come back to him, his executors or administrators—that is, to his estate. *In re Palmer* (3), which overruled *Humble* v. *Shore* (4), applies, and the other residuary legatees take.

E. Beaumont, for the legal personal representatives of the eldest son. I submit that there was an intestacy as to Mrs. Currie's one twelfth share of residue after her death. *Lassence* v. *Tierney* (5) does not apply, because the testator has taken away Mrs. Currie's share from her and has given it to the trustees of her settlement, leaving her nothing whatever under the will directly, but only a life estate by virtue of the settlement. There is, therefore, nothing to which *Lassence* v. *Tierney* (5) can apply.

This case is not even substantially like *In re Palmer*. (3)

I submit that the trust for the testator, his executors or administrators, is a good trust, but that he has not disposed of the benefit which he takes under it, and the share so undisposed of does not pass to the other residuary legatees. Mrs. Currie does not take it because she has been cut out of every interest except a life estate, and by the direction that the share should be paid to the settlement trustees the testator has destroyed the original gift of corpus to her. There is therefore an intestacy.

G. T. Simonds, for the representatives of the surviving trustee of the testator's will.

(1) [1901] 1 Ch. 482.
(2) [1902] A. C. 14.
(3) [1893] 3 Ch. 369.
(4) (1847) 7 Hare, 247.
(5) 1 Mac. & G 551.

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Hughes, K.C., in reply. The bequest by the testator of this share to himself, his executors and administrators, lapses: *Elliott* v. *Davenport* (1); *In re Hensler.* (2) But it is not undisposed of. There is an absolute gift in the will to the daughter, and the provision for settlement is not intended to cut it down. It is a settlement of the share which but for the provision for the settlement "would belong" to the daughter. The share is severed from the estate. On the failure of the trusts of the settlement the original absolute gift remains — *Lassence* v. *Tierney* (3)—and the daughter or her estate takes.

Cur. adv. vult.

Jan. 14. JOYCE J. The testator in this case by his will, which was dated in 1854, gave the residue of his personal estate upon trusts for sale and conversion and declared and directed that his trustees should hold and stand possessed of the moneys that arose from such conversion, the moneys belonging to him at the time of his death, and also the moneys to arise from the sale directed in the earlier part of the will of his freehold, copyhold, and leasehold hereditaments, upon trust in the first place to pay his debts, testamentary expenses, legacies, and so on, "and subject thereto upon trust for all and every the child and children of mine (except my said eldest son Bonfoy Rooper) who shall be living at my decease and who shall attain the age of twenty-one years as tenants in common." Then there is a provision for the issue living at the testator's decease of any child who shall die in his lifetime. Stopping at the point down to which I have read in this will, there is a clear gift in effect absolute of an aliquot share of the residue of the testator's estate to each child, daughter as well as son, who attains twenty-one and survives the testator. Mrs. Currie was such a daughter. This was a fair equal and equitable distribution of his estate among his children. But then there follows a proviso: "Provided always"—I am reading it short—"and I hereby direct that the share or shares of the said trust funds which under the trusts hereinbefore contained would belong to any daughter or daughters of mine who at the time of

(1) (1705) 1 P. Wms. 83. (2) (1881) 19 Ch. D. 612.
(3) 1 Mac. & G. 551.

my decease shall be or have been married shall go and be paid to the trustees of the settlement made on the marriage of such daughter and be held by such trustees upon the same trusts" and so on—" as in such settlement are declared concerning the moneys thereby settled by me upon my daughter or daughters or such of them as shall then be subsisting and capable of taking effect." The will was dated in 1854, and the testator died in 1855. Mrs. Currie survived him for more than fifty years, namely, until 1909, when she died without having had issue. Her husband Mr. Currie also survived the testator, but predeceased Mrs. Currie in 1860. At the date of the testator's death Mrs. Currie might still, I suppose, have had issue by her then husband, or she might have married again.

Now under Mrs. Currie's marriage settlement the ultimate trust of the fund settled by the testator upon Mrs. Currie in default of issue of Mrs. Currie (and, as I have said, there were none) was for her father the testator, his executors, administrators, and assigns. If this ultimate limitation had been simply for some person, A., who was living at the date of the will, but afterwards died in the lifetime of the testator, it is clear, I think, that the trust for A. under the will, created by reference to the trusts of the settlement, must have failed by lapse, and if authority for this be wanted it is to be found in the case of *Culsha* v. *Cheese* (1), before Wigram V.-C. I think the result would be the same if the ultimate trust under the will, though limited by reference to the settlement, had been for A., his executors, administrators, and assigns; and indeed in the case to which I have referred the limitation there in question was for three deceased persons, their executors, administrators, and assigns. A devise to A. and his heirs lapses by the death of A. in the lifetime of the testator. In a conveyance or bequest to A., his executors, administrators, and assigns, the words "and assigns" are superfluous, and the words "his executors and administrators" are mere words of limitation denoting or emphasizing the fact that an absolute interest is given. A bequest to A., his executors and administrators, becomes inoperative and fails or lapses by the death of A. in the testator's lifetime: *Elliott*

(1) (1849) 7 Hare, 236.

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v. *Davenport* (1); *Stone* v. *Evans* (2); *Maybank* v. *Brooks.* (3) A bequest by a testator of a share of residue either immediately or after preceding limitations to himself, or to himself, his executors, administrators, and assigns, would, in my opinion, be unmeaning and inoperative for any purpose. No rational testator or draftsman ever intentionally framed such a limitation. No one can take under a will who does not survive the testator. Moreover, the trusts limited by the testator's will of Mrs. Currie's share are the trusts in the settlement declared concerning the moneys thereby settled by the testator upon Mrs. Currie or such of them as shall be then—that is at and after the testator's death—subsisting and capable of taking effect, which in my opinion a trust for the testator, his executors, administrators, and assigns was not. I come to the conclusion, therefore, that in the events which happened there is no valid effective trust declared by the testator's will of Mrs. Currie's aliquot share of residue upon or after her death without having issue.

Now, returning to the proviso, if this, instead of providing that the share of Mrs. Currie should go and be paid to the trustees of her marriage settlement, had merely required the trustees of the will to retain Mrs. Currie's share and hold it upon the trusts, &c., in the settlement declared concerning the moneys thereby settled by the testator on Mrs. Currie or such of them as should be then subsisting and capable of taking effect, then, having regard to what I have already decided, it appears to me tolerably plain that upon Mrs. Currie's death without issue she, or rather her representatives, under the rule in *Lassence* v. *Tierney* (4), would have been absolutely entitled to the trust funds constituting her aliquot share of the residue under the testator's will: see the passage in Lord Davey's judgment in *Hancock* v. *Watson* (5) so often referred to, where he says: "It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts

(1) 1 P. Wms. 83.
(2) (1740) 2 Atk. 86.
(3) (1780) 1 Bro. C. C. 84.
(4) 1 Mac. & G. 551.
(5) [1902] A. C. 14, 22.

have failed to the exclusion of the residuary legatee or next of kin as the case may be." (See Underhill and Strahan on the Principles of the Interpretation of Wills and Settlements, 2nd ed. p. 178.) But the actual proviso did not merely direct that the trustees of the will should retain Mrs. Currie's share, but that it should go and be paid to the trustees of her settlement. Does the circumstance of these trustees being the trustees of the share instead of the trustees of the will in the result make any difference? They are to be merely trustees with no beneficial interest. Looking at the substance of the matter and without attaching undue importance to the mere form, I think the circumstance that the trustees to hold Mrs. Currie's share are the trustees of the settlement and not merely the trustees of the will makes no real difference. Moreover, the fund settled by the proviso is provided out of a share which, but for the settlement, belonged to the daughter Mrs. Currie absolutely. So that if there were any case or any question of a resulting trust, that resulting trust should be, in my opinion, not for the testator in the circumstances of this case, but for Mrs. Currie. If there be no complete effective disposition of Mrs. Currie's share after her death except in the original gift to or for Mrs. Currie, she ought to take under *Lassence* v. *Tierney*. (1) If and so far as not otherwise disposed of she ought to have it.

I hold, therefore, that according to the true construction of the testator's will and in the events that have happened Mrs. Currie's share of the residue devolved upon her death without issue upon her legal personal representative.

Solicitors: *Rooper & Whately; Currie, Williams & Williams.*

(1) 1 Mac. & G. 551.

R. M.

JOYCE J.
1910
Jan. 17, 26, 27, 28.

MEASURES BROTHERS, LIMITED *v.* MEASURES.

[1909 M. 2987.]

Company—Director—Contract of Service—Restraint on Trade—Winding-up—Repudiation—Specific Performance—Information acquired during Service—Confidential Relation—Injunction.

The defendant agreed with the plaintiff company, of which he was a director, to hold office for seven years at a fixed salary, and covenanted that so long as he should continue to hold office and for seven years after ceasing to hold such office he would not either solely or jointly with, or as manager or agent for, any other person or persons or company directly or indirectly carry on or be engaged or interested in any business that would compete with that carried on by the company. A receiver and manager was afterwards appointed in a debenture-holders' action and a compulsory winding-up order was made against the company. The receiver and manager having given notice to the defendant that his services would no longer be required and ceased to pay his salary, the defendant commenced to carry on business on his own account. During the course of his employment by the company the defendant had caused to be made for his own purposes certain lists of the names and addresses of the company's customers, and after the winding-up he sent circulars to and solicited orders from such customers.

In an action to restrain him from carrying on business in competition with the company in breach of his covenant, and for an order upon him to deliver up the lists of customers :—

Held, that the winding-up order operated as a wrongful dismissal of the defendant, and that, applying the principle of *General Billposting Co.* v. *Atkinson*, [1909] A. C. 118, he was no longer bound by his restrictive covenant.

But *held*, also, that he had no right to make or take copies of the lists in question for his own purposes, and that he must deliver up all such lists or copies thereof as were in his possession or under his control.

Trial of Action.

This was an action by the plaintiff company (in liquidation) asking for an injunction to restrain the defendant, H. J. T. Measures, a former director, from carrying on business in competition with the company in breach of an agreement whereby he had contracted to hold office for seven years at a fixed salary, and covenanted during that period, or within seven years after ceasing to hold office, not to carry on or be concerned in any business that would compete with the company's business.

The company was incorporated in 1899 for the purpose of

acquiring an engineering and ironfounding business then carried on at Croydon and in Southwark Street, London, by a former company of the same name.

By an agreement dated July 14, 1903, the defendant and R. T. Measures, another director, agreed with the company to hold office as directors for a period of seven years from June 26, 1903, at a salary of 1000*l.* a year each and respectively to devote so much of their time and attention to the business of the company as might be necessary.

The agreement further provided (clause 5) that each of them the defendant and R. T. Measures should covenant with the company that he would not at any time thereafter while he should hold the office of director of the company, or within seven years after ceasing to hold such office, either solely or jointly with, or as manager or agent for, any other person or persons or company directly or indirectly carry on or be engaged or concerned or interested in the businesses of engineers or ironfounders in any of their respective branches that would in any way compete with or be detrimental to the business carried on by Measures Brothers, Limited, or permit or suffer his name to be used or employed in carrying on or in connection with the said businesses or either of them within the United Kingdom, save so far as he should be interested as a member of the company or be employed as an officer, servant, or agent of the company in the business of the company.

By clause 6 it was provided that at the expiration of the term of seven years thereinbefore mentioned each of them the defendant and R. T. Measures should be entitled, if he thought fit, to continue in office for a further period of seven years, and should during such further period receive by way of remuneration such a sum as might be agreed upon by the directors and the shareholders in general meeting.

On April 20, 1909, a receiver and manager of the assets and business of the company was appointed in a debenture-holders' action, and on October 13, 1909, an order was made for the compulsory winding-up of the company.

The receiver and manager having given notice to the defendant that his services would no longer be required by the company

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and that payment of his salary would be discontinued, the defendant commenced to carry on business as an engineer and ironfounder at Southwark Street in London and issued circulars soliciting orders from the customers of the company.

It was alleged by the plaintiff company that the defendant had in his possession certain lists of the names and addresses of or other information relating to the customers of the company, which he had obtained whilst he was in the service of the company, and that he was otherwise using information confidentially acquired by him as director for the purpose of enabling him to carry on business on his own account.

This action was commenced by the receiver under the direction of the Court for an injunction to restrain the defendant for the period of seven years from October 13, 1909, from carrying on business in breach of the agreement of July 14, 1903, and for an order upon him to deliver up all lists of the names and addresses of the company's customers copied or extracted by or at the instance of the defendant from the books of the company in his possession or under his control; and further for an injunction to restrain the defendant from making use of any information obtained by him from such lists or any copies thereof.

Younger, *K.C.*, and *Whinney*, for the plaintiffs. We submit, in the first place, that the defendant has committed a breach of the restrictive covenant, and, secondly, that he is not entitled to carry on business and solicit the customers of the company as he is doing.

The plaintiffs' right to an injunction to restrain a breach of the covenant would have been plain if the contract for service had terminated in the ordinary course, and we contend that termination by the compulsory liquidation of the company is not a repudiation within the decision of *General Billposting Co.* v. *Atkinson*. (1) Winding up by compulsion is not a repudiation.

It is an implied term of the agreement of July 14, 1903, that the employment of the defendant should continue only so long as there was the office of director which could be filled by him, and if the office ceases then there is no breach by the company.

(1) [1908] 1 Ch. 537; [1909] A. C. 118.

A director appointed by the articles of association only has no claim if the company comes to an end by being wound up, and directors' fees are not apportionable. The articles are not the contract, but only contain the terms of service: *Swabey* v. *Port Darwin Gold Mining Co.* (1), referred to in *Isaacs' Case* (2), approved in *Salisbury-Jones and Dale's Case.* (3) A director cannot get damages for the determination of his office under the articles, because it is implied that he shall be director only so long as there is the office of director to be filled. In this agreement there is a recital that the defendant had become a director fourteen days before, and that shews that he was to be regarded as director under the articles and was to remain such. The winding-up order put an end to the office, and there is nothing to warrant the extension and application of the doctrine of repudiation in *General Billposting Co.* v. *Atkinson* (4) to this case.

An implied obligation that the company will not go into liquidation cannot be read into this contract: *Rhodes* v. *Forwood* (5); *Turner* v. *Goldsmith* (6), referring to *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (7); *Hamlyn & Co.* v. *Wood & Co.* (8) On the winding-up order being made the director's office ceases, and the terminus of the service is then established: *Taylor* v. *Caldwell.* (9)

The appointment of a receiver and manager in the debenture-holders' action did not constitute a breach of the contract of service; the service and remuneration continued down to the time of liquidation: *In re South Western of Venezuela (Barquisimeto) Ry. Co.* (10)

In re Dale and Plant, Ld. (11) was a case where damages were allowed to a director for loss of salary, but he was a managing director appointed for his special knowledge.

We submit that on the form of the covenant there can be no question of invalidity: *Vernon* v. *Hallam.* (12) The onus of shewing that is on the defendant.

(1) (1889) 1 Megone, 385.
(2) [1892] 2 Ch. 158.
(3) [1894] 3 Ch. 356.
(4) [1909] A. C. 118.
(5) (1876) 1 App. Cas. 256.
(6) [1891] 1 Q. B. 544.
(7) (1876) L. R. 3 Ind. Ap. 200.
(8) [1891] 2 Q. B. 488.
(9) (1863) 3 B. & S. 826.
(10) [1902] 1 Ch. 701.
(11) (1889) 43 Ch. D. 255.
(12) (1886) 34 Ch. D. 748.

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On the second point we submit that the defendant was not entitled to make such use of confidential information obtained by him as he has done.

Hughes, K.C., and *P. F. Wheeler*, for the defendant. The plaintiff company must perform its own obligation under the agreement before it can proceed to enforce the defendant's. The consideration for the restrictive covenant was the employment of the defendant for seven years, and that was his reason for entering into the covenant. His obligation lasts only so long as the company lasts: *Telegraph Despatch and Intelligence Co.* v. *McLean.* (1) This is a stronger case than *General Billposting Co.* v. *Atkinson* (2), because here the term of service was for seven years certain, whereas in that case it could be determined on twelve months' notice.

This is an agreement of service and the defendant is a servant only. A compulsory winding-up order or the appointment by the Court of a receiver and manager in a debenture-holders' action operates as a dismissal of the servants—*Midland Counties District Bank* v. *Attwood* (3); *Reid* v. *Explosives Co.* (4)—and determines the defendant's employment: *Brace* v. *Calder* (5); *Chapman's Case* (6); *McDowall's Case.* (7)

In this case there are two interdependent contracts—one that the company will employ the defendant for seven years certain and for a possible further period of seven years; the other, that the defendant, if so employed, will not on the determination of the contract carry on business in the manner specified. In such a case readiness to perform his own part of the contract is a condition precedent to the right of either contractor to sue: see notes to *Cutter* v. *Powell.* (8)

The plaintiffs cannot obtain an injunction without performing their part of the contract, and they cannot recover damages without averring and proving their readiness to perform.

Rhodes v. *Forwood* (9), *Turner* v. *Goldsmith* (10), and *Hamlyn*

(1) (1873) L. R. 8 Ch. 658.
(2) [1909] A. C. 118.
(3) [1905] 1 Ch. 357.
(4) (1887) 19 Q. B. D. 264.
(5) [1895] 2 Q. B. 253.
(6) (1866) L. R. 1 Eq. 346.
(7) (1886) 32 Ch. D. 366.
(8) (1795) 2 Sm. L. C., 11th ed. pp. 9 et seq.
(9) 1 App. Cas. 256.
(10) [1891] 1 Q. B. 544.

& Co. v. *Wood & Co.* (1) are not applicable. We do not say that the company must carry on its business, but we say that if it does not carry it on it cannot enforce the restrictive covenant against the defendant. [They referred also to *Gosling* v. *Gaskell* (2); *Madrid Bank* v. *Bayley* (3); *'Société Générale du Commerce et de l'Industrie en France* v. *Johann Maria Farina & Co.* (4); *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (5); *Addis* v. *Gramophone Co., Ld.* (6); *In re Dale and Plant, Ld.* (7); and the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186.]

Younger, K.C., in reply. There has been no breach of the agreement by the company. The agreement has come to an end in its natural course, and there is no ground for saying that the covenant is not binding on the defendant.

It is said that the principle of *General Billposting Co.* v. *Atkinson* (8) is applicable howsoever the agreement came to an end, but in that case there was a deliberate repudiation of the contract by the company.

There is here no definite contract to employ the defendant for seven years, but only so long as the company shall exist. There is no authority for the proposition that when the employment comes to an end by reason of a winding-up order being made the defendant's covenant ceases to be binding upon him. [He also referred to *Merryweather* v. *Moore* (9) and *Lamb* v. *Evans* (10) upon the question of the defendant's right to make use of the lists obtained by him in the course of his employment, and to *In re South Western of Venezuela* (*Barquisimeto*) *Ry. Co.* (11) and *Proctor* v. *Sargent.* (12)]

Cur. adv. vult.

Jan. 28. JOYCE J. The claim of the plaintiffs in this case is of a twofold nature. They ask, first, for an injunction to restrain the defendant from acting as manager or agent and so on for any

(1) [1891] 2 Q. B. 488.
(2) [1897] A. C. 575.
(3) (1866) L. R. 2 Q. B. 37.
(4) [1904] 1 K. B. 794, 797.
(5) (1884) 9 App. Cas. 434.
(6) [1909] A. C. 488.
(7) 43 Ch. D. 255.
(8) [1909] A. C. 118.
(9) [1892] 2 Ch. 518.
(10) [1893] 1 Ch. 218, 226.
(11) [1902] 1 Ch. 701.
(12) (1840) 2 Man. & G. 20.

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other person than the plaintiff company; and, secondly, for an order upon the defendant to deliver up all lists of the names and addresses of the plaintiffs' customers copied or extracted by or at the instance of the defendant from the books of the plaintiff company; and an injunction to restrain the defendant from making use of any information obtained by him from any such lists or copies thereof or extracts therefrom. Then, in addition to that, they ask for damages and costs.

With regard to the second claim I cannot say that I feel any difficulty. It is admitted that what the defendant did was this: being a director, and there being a provision in the agreement of service that he should have a salary of 1000*l.* a year for seven years, before any winding-up, or before any appointment of a manager or receiver, he in June, 1909, directed a clerk of the company to make out a list of the customers. Later in the same month he appears to have got this list from the secretary, and to have borrowed it and had a copy made for his own private use. When I say private use I mean for his own purposes quite apart from any business of the company. He had that copy made with a view to using it if and when he should be in a position or should think fit to compete in business with the company. Then, later on, after the winding-up order, and of course after the appointment of the receiver, he appears to have sent out circulars soliciting custom from the customers whose names were in the list. No complaint is made, nor any relief asked by the claim in this action, with respect to the statements in that circular. But he stated in the circular that there had been an order made by the High Court for the compulsory winding-up of the company and that he had set up in business for himself and was prepared to deal with all inquiries and orders in connection with the work which had been carried on by the late company. With that, however, I have nothing to do now. The real question now is about the defendant having taken a copy of this list for his own purposes.

Notwithstanding the very strenuous argument addressed to me by the defendant's counsel, having been referred to the case of *Merryweather* v. *Moore* (1), with which I entirely agree, and also

(1) [1892] 2 Ch. 518.

to the judgments of Lindley, Bowen, and Kay L.JJ. in *Lamb* v. *Evans* (1), and of Lord Esher M.R. and Kay and Smith L.JJ. in *Robb* v. *Green* (2), I have no hesitation in holding that the defendant in what he did was guilty of a gross breach of duty towards the plaintiff company. I hold that no man who is in the employment of another is entitled to use or even take a copy, for his own private purposes, of any document of his employer which comes to his hands or to which he has access in the course of his employment. Consequently I hold that the plaintiffs are entitled to relief in respect of that matter. I am of opinion that not only was a person in the position I have mentioned not entitled to make such a list or make a copy of any document, but he should be ordered to give up any such document or any copies that he has made from it. There is a difficulty, perhaps, about restraining him from using the information, but that I will mention later. So much for that part of the case.

Then the first part of the claim is to enforce against the defendant the terms of the special agreement of July 14, 1903. That is for an injunction to restrain the defendant from doing that which by the fifth clause of that agreement he agreed not to do. [His Lordship referred to the clause, and continued.] Now in the case of *General Billposting Co.* v. *Atkinson* the facts are stated in the report in [1908] 1 Ch. 537. In that case there was a manager of the company who was entitled, under his agreement of service with the company, to twelve months' notice. He was dismissed for some reason or another, and he brought an action for wrongful dismissal and recovered damages. Then, there being a clause in the agreement restricting his right to trade after the termination of his service with the company, this action of *General Billposting Co.* v. *Atkinson* (3) was instituted for the purpose of enforcing that restriction against him. In the head-note to the report in the House of Lords (4) it is thus stated: "Employers agreed with their manager that he should hold office subject to termination at twelve months' notice by either party and with a restriction on his right to trade after its termination. The employers having wrongfully dismissed

(1) [1893] 1 Ch. 218.
(2) [1895] 2 Q. B. 315.
(3) [1908] 1 Ch. 537.
(4) [1909] A. C. 118.

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him without notice:—Held, that he was entitled to treat the dismissal as a repudiation of the contract and to sue them for damages for breach of contract, and was no longer bound by the restriction on trade."

I think it is well settled that when a manager is engaged by a company for a term of years—I need not deal with the question whether it is determinable on notice or not, it does not matter—a compulsory order for winding up is a dismissal or discharge, whichever it may be called, of that manager; and that it is wrongful, or at all events is a dismissal not authorized by law as between the company and the manager. The appointment in a debenture-holders' action of a receiver and manager has a similar effect. The manager of the company agrees to serve the company, not the receiver and manager. The case cited to me of *Reid* v. *Explosives Co.* (1) was a case of the appointment of a receiver and manager, and there are other cases where there was a compulsory order to wind up. Consequently I think it follows from the decision in *General Billposting Co.* v. *Atkinson* (2) that in the simple case of a manager of a company for a term the making of a winding-up order or the appointment of a receiver and manager has the effect of a wrongful dismissal of such manager, and he is entitled at once to sue for wrongful dismissal or breach of contract, whatever it may be. In my opinion, in such circumstances, the decision in *General Billposting Co.* v. *Atkinson* (2) would apply, and the company would not be able to enforce against the dismissed manager such a restriction on trade as is contained in clause 5 of this agreement.

But this is not the simple case of a manager; it is the case of a director who was appointed manager by a special and conditional agreement of service. The obligation undertaken by the defendant in clause 5 of the agreement is a very stringent one, and it appears to me that the consideration which was given for the defendant undertaking that obligation is contained in the other clauses of the agreement; that is, he was to get a directorship for seven years at a salary of 1000*l.* a year, and there was also the further provision that at the expiration of the term of years

(1) 19 Q. B. D. 264. (2) [1909] A. C. 118.

of service he should be engaged at a salary to be agreed upon. I do not see any difficulty about the consideration. He was content to take such a salary. He was entitled under this agreement to be a director for the first seven years at a salary of 1000*l.* a year, and for the next seven years at such a salary as might be given to him, to be settled by the directors and the shareholders in general meeting. In this case, in my opinion, it is not correct to say that he gets this salary under the articles. He gets it under a further and conditional agreement which is authorized by a special resolution and which the company could not authorize without the special resolution.

Then came the appointment of a receiver and manager in the debenture-holders' action, followed by the compulsory winding-up order. Now, whether the defendant technically ceased to be a director in name upon the making of the compulsory order to wind up or not I do not know, but he had no more work to do, and he had no more pay, and his employment ceased. It was fairly admitted and agreed by the other side, in fact it is common ground, that in truth and substance he ceased to be a director. I need not say that that was a very serious matter for him. I do not know that it has really very much to do with the case, but obviously it is a most serious matter for him if he is bound by this restriction on trade in the 5th clause, because he is turned out of office and he loses his 1000*l.* a year which he would get for the residue of the seven years, and he loses his further right to be a director with such further remuneration as may be fixed. On the other hand it may be said to be a serious thing for the company, and in one sense it is, if the defendant is no longer bound by this restriction. But when you come to think of it, that is what happens in every ordinary case. When a company is wound up, why may not every one of the directors set up in competition with the company? All I can say is this: after such consideration as I have given to this case, I think that, having regard to the circumstances and in view of this agreement, the decision in *General Billposting Co.* v. *Atkinson* (1) does apply, and that the plaintiffs are not entitled against this defendant to specific performance, because that is what it is, of clause 5 of the special

(1) [1909] A. C. 118.

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agreement without performing—and they cannot perform—the clauses which that agreement contains in favour of the defendant. In my opinion it would be inequitable if the plaintiffs could have that relief, and I decline to give it. The result is that in my opinion the first claim fails, and that part of the action must be dismissed.

As to the other part of the case, which I have already dealt with, I think the plaintiffs are entitled to an order for the delivery up of any lists, or copies of lists, putting it in the proper form, and to an inquiry as to damages; but I feel the difficulty which Kay L.J. also felt in *Lamb* v. *Evans* (1) as to granting an injunction restraining the defendant from using information.

Younger, K.C. We do not ask for that.

JOYCE J. Of course there might be a case in which there was no difficulty in granting such an injunction. There might be some simple matter, one particular fact or another, and it might be possible to determine whether the defendant was using the information or not; but in this case it would be impossible.

Solicitors for plaintiff company: *Budd, Johnsons & Co.*
Solicitors for defendant: *Wetherfield, Son & Baines.*

(1) [1893] 1 Ch. 218, 236.

G. A. S.

ATTORNEY-GENERAL *v.* WALTHAMSTOW URBAN DISTRICT COUNCIL.

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Feb. 1, 4.

[1909 A. 769.]

Local Government—Public Baths—Letting for Music and Dancing—Taking Money at the Doors—Baths and Washhouses Act, 1899 (62 & 63 *Vict.* c. 29), *s.* 2.

By the Baths and Washhouses Act, 1899, the commissioners appointed under the Baths and Washhouses Acts, 1846 to 1899, are empowered to let public swimming baths, when closed, for music or dancing, subject to licence by the county council, but the Act provides that no money for admission be taken at the doors. The defendants, an urban district council, being commissioners under the Acts, obtained the requisite licence and let the baths in their district to persons who used them for entertainments comprising music, and at these entertainments money for admission was taken at pay-boxes placed on the defendants' land just outside the building. The hiring agreement between the defendants and their lessees contained a condition that no money should be taken at the doors.

In an action by the Attorney-General for an injunction to restrain the defendants from taking or permitting to be taken money at the doors:—

Held that, there being no provisions in the Act making the commissioners responsible for the acts of their lessees, the Court would not compel the defendants to take proceedings against their lessees at the risk of a decision that what was done by them was not an unlawful evasion of the Act; and, the defendants not claiming the right to take money at the doors, or to authorize their lessees to do so, no injunction ought to be granted.

Trial of Action.

The action was brought by the Attorney-General, on the relation of J. L. Graydon, for an injunction to restrain the defendants from taking or permitting to be taken at the doors money for admission to the public baths at Walthamstow on occasions when they were let for the purposes of entertainments comprising music or dancing. The action was founded upon the prohibition against money being so taken contained in s. 2 of the Baths and Washhouses Act, 1899.

The defendant council had vested in it all the powers, rights, duties, capacities, liabilities and obligations of "the commissioners" under the Baths and Washhouses Acts, 1846 to 1899.

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The relator was the honorary secretary of the Entertainments Protection Association, an association representing theatrical and variety proprietors and managers in London and the provinces, By virtue of the said Acts the defendant council owned, controlled. and were responsible for the letting and user of premises known as the public baths at Walthamstow in Essex.

By s. 5 of the Baths and Washhouses Act, 1878, power was given to close public swimming baths for a limited period in each year and to use them for the purposes of a gymnasium or other means of healthful recreation or for holding meetings, provided always that no covered or open swimming bath when closed might be used for music or dancing. That provision was repealed by s. 2 of the Baths and Washhouses Act, 1899, which provided "(*a*) That the commissioners appointed under the Baths and Washhouses Acts, 1846 to 1899, or any other body for the time being acting in the execution of those Acts, which commissioners or other body are hereinafter referred to as 'such commissioners,' shall, before any such bath is used for music or dancing, obtain such licence as may be required for the use of a place for that purpose under any enactment in force in the area for which such commissioners act, or, if no such enactment is in force, obtain a licence from the county council of the county in which the district of such commissioners is situate. (*b*) That no portion of the premises in respect of which the licence is granted be let otherwise than occasionally to any person or persons, corporate or otherwise, and that no money for admission be taken at the doors. (*c*) That such commissioners be responsible for any breach of the conditions on which the licence is granted, which may occur during any entertainment given on such premises by their permission."

The defendants had obtained from the Essex County Council, under the Disorderly Houses Act, 1751, a licence in respect of the baths for music and dancing. It was alleged by the plaintiff that the defendants had let or used or permitted to be used their public baths for the purpose of various entertainments comprising music, and had taken or permitted to be taken money at the doors for admission to such entertainments. This was denied by the defendants, who said that on all

occasions on which they had granted any permission or licence to use the baths for any purpose other than swimming it had been on the express condition that no money should be taken at the doors, and if on any such occasion money had been so taken it had been done in breach of such condition and without the sanction, authority, permission, or knowledge of the defendants; and the defendants did not claim, threaten, or intend so to take or permit money to be so taken.

There was evidence that on some occasions money had in fact been taken at pay-boxes which were fixed inside the entrance to the baths, and that, upon complaints being made of this, movable pay-boxes were placed by the defendants' licensees upon land belonging to the defendants just outside the building, and that these had been used for the purpose of taking money for admission to the entertainments. It was proved that the defendants for the purpose of letting the baths for entertainments used a printed form of application to be filled up and signed by intending licensees. This form stated that the applicant having perused the conditions and regulations thereto attached undertook to abide by and conform to the same in the event of his application being granted.

Amongst the conditions and regulations attached to the form were the following: "14. No money must be taken at the doors"; and "24. If any hirer refuse or omit to comply with any of these conditions or regulations or with any instructions conveyed to him by the clerk of the council, on behalf of the council, he and his servants may be excluded until he comply with the same, but without relieving him from his obligations under any contract or agreement."

Younger, K.C., and *W. Payne*, for the plaintiff. The plaintiff is entitled to the injunction asked for. The prohibition of the statute is absolute, and the defendants, who have it in their power to prevent the breach of it, are responsible for any such breach. Under their agreements with their lessees or licensees they have the power, and they are bound to use it, of preventing any breach of the statutory prohibition. The statute expressly makes the commissioners responsible for any breach of the

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conditions under which the licence for music and dancing is granted, and that licence must be read as if the prohibition against taking money at the doors were inserted in it. The defendants cannot hold the licence except on the terms of the Act of 1899, and that Act imposes the condition. The defendants could have stopped this breach of the statute by exercising their right of re-entry under clause 24 of their agreement. They cannot get rid of their statutory obligation by inserting a condition in their agreements and taking no steps to enforce it: *Attorney-General* v. *London and North Western Ry. Co.* (1)

Hughes, K.C., and *J. Mansfield*, for the defendants. The defendants are not guilty of any breach of the statute. They have let the baths subject to a condition that the statute shall not be broken. They cannot be compelled to bring an action against their licensees or to turn them out. There is no ground for an injunction to restrain them from permitting the prohibited act from being done: *Hall* v. *Ewin* (2); *Powell* v. *Hemsley*. (3) The Court will not grant a mandatory injunction in such a case: *Glossop* v. *Heston and Isleworth Local Board*. (4) The Attorney-General complaining that a public body is offending against a statute is not entitled ex debito justitiæ to an injunction: *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board*. (5)

The commissioners are made responsible by s. 2 (*c*) for any breach of the conditions on which the music and dancing licence is granted, but those conditions do not include the proviso against taking money at the doors, and the defendants are not responsible under the statute for the acts of their licensees or lessees.

Younger, K.C., in reply. One of the members of the defendant council is a director of a company to which the baths were let and by which the provisions of the Act were broken. The defendants therefore had complete notice that the Act was being disregarded and they cannot escape responsibility. They have clearly permitted and assisted in the doing of an unlawful act.

(1) [1900] 1 Q. B. 78.
(2) (1887) 37 Ch. D. 74, 78.
(3) [1909] 2 Ch. 252.
(4) (1879) 12 Ch. D. 102, 120, 122.
(5) Ante, p. 48.

It is no answer to say that they have inserted in their lessees' agreements a condition that the act shall not be done. The plaintiff is entitled to an injunction restraining the defendants from permitting, assisting, facilitating, or conniving at or acquiescing in money being taken at the doors. It is not necessary for the defendants to take any proceedings in order to stop what is being done with their assistance. [He also referred to Seton on Judgments, 6th ed. vol. i. p. 540.].

Cur. adv. vult.

Feb. 4. JOYCE J. The defendants in this case are the owners of the public baths and washhouses at Walthamstow, and they are authorized by statute to let the baths for entertainments and so on. There is a provision in the Act of 1899 that no portion of the premises is to be let otherwise than occasionally to any person or persons for that purpose, and that no money for admission be taken at the doors. No reason for this provision as to not taking money at the doors is indicated in the Act, nor does it appear in whose interest (if it be in the interest of anybody) that provision was inserted. I am told that it was for the protection of certain persons formed into an association, of which the relator is secretary. It is by no means clear to me why these persons should be protected at all, nor how, if at all, this Act protects them. No penalty is imposed by the Act itself, nor is any remedy provided for a breach of its provisions.

The action is for an injunction to restrain the defendants, that is, the Urban District Council of Walthamstow, from taking, or permitting to be taken at the doors, money for admission to the public baths on such occasions as they are let for the purposes of music or dancing, and there is an allegation in the statement of claim that the defendants have taken or permitted to be taken money at the doors of the public baths for admission to such entertainments. The defendants are not under any covenant or contract of any sort or kind. Where there is an express covenant not to permit a thing to be done, an injunction may probably and in most cases, if not all, would be granted against permitting it to be done, although where the defendants are not

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in actual possession of the premises upon which the act complained of is being done it is not clear what would constitute a violation of the injunction if granted. The defendants have let or granted licences for the use of the baths for music or some entertainment, and it was suggested that the lessees or licensees, whatever they may be, have, some time back, taken money at the doors, and it is alleged, though perhaps not very distinctly, that they are now evading or seeking to evade the provisions of the statute by the erection of pay-boxes a short distance from the doors and taking money in those pay-boxes, not actually at the doors themselves. It is sought to compel the defendants somehow or other to prevent the lessees or licensees from doing what is done on the assumption that it is a contravention of the statute. Now, if an injunction be granted as asked, it would or might render the defendants liable to sequestration, or it might possibly render the members of the council subject to attachment or committal for the conduct or misconduct of their lessees or licensees, even though the defendants as a body disapproved or bona fide objected to what was being done. This is really what is sought to be obtained, namely, that the Attorney-General may be in a position to apply for a writ of sequestration or an order for attachment and committal against the members or some of the members of the council. But when we look at the statute there is nothing in it as to the responsibility of the defendants, that is the owners of the baths, for the lessees or licensees. Although it is provided that they are to be responsible for any breach of the conditions upon which the licence is granted by the county council, or whatever body it may be, to use the place at all for music or dancing, there is no provision that they are to be responsible for the conduct of any lessee or licensee in reference to the provisions of this Act as to money for admission being taken at the doors. It seems to me that I am asked to impose this responsibility and to make the defendants responsible for that—not only responsible for what I have indicated, but also responsible for that for which the Act does not make them responsible. In other words, I think, I am asked to add another clause to the Act.

Now I do not doubt that the defendants might be restrained

from causing a violation of this provision of the statute if in fact they did cause or intended to cause it. I think also they might be restrained from authorizing, if they threatened or intended or claimed the right to authorize, their lessees or licensees to take money at the doors. But in fact they have not authorized, or at all events it is not shewn to me that they have authorized it—on the documents they have not—and the most that it comes to is that they have not been so energetic as they might be, or used their best endeavours to prevent the violation of the Act.

Upon the whole I think that, if any such order as asked were made, I should, as I have said, be imposing upon the defendants a responsibility for the misconduct of their lessees or licensees, and I should be adding to the provisions of this Act something not enacted by it. The Attorney-General can take proceedings against the really guilty parties if he pleases to do so. I will not say what the form of those proceedings would or might be. I do not see how I could possibly compel the defendants to commence an action or take proceedings against their lessees or licensees, nor do I think it would be reasonable; at all events I do not see my way to compel the defendants to take the responsibility of excluding their lessees or licensees on the ground of what has been done with reference to the pay-boxes, thus compelling the defendants to take the risk of the result of a decision as to whether or not taking money at the pay-boxes outside the building is an evasion, or is an unlawful evasion, of the provisions of the Act of Parliament. The result is that this action fails and must be dismissed.

Solicitors: *P. J. Rutland; Cartwright & Cunningham.*

G. A. S.

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Oct. 27, 28; *Nov.* 3, 4, 24, 25.

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Feb. 10.

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[1906 B. 2882.]

Conflict of Laws — Contract — Proper Law—Intention — Contract to issue Debentures—Floating Charge on Foreign Land—Clog on Equity of Redemption—Chartered Company—Breach of Charter—Ultra vires.

The proper law of a contract that is neither immoral nor contrary to public policy must be determined by the intention of the parties.

Lloyd v. *Guibert*, (1865) L. R. 1 Q. B. 115, 120, 122; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, (1883) 10 Q. B. D. 521, 540; *Jacobs* v. *Crédit Lyonnais*, (1884) 12 Q. B. D. 589, 600; *In re Fitzgerald*, [1904] 1 Ch. 573, 587; *Peninsular and Oriental Steam Navigation Co.* v. *Shand*, (1865) 3 Moo. P. C. (N.S.) 272, 292; *In re Missouri Steamship Co.*, (1889) 42 Ch. D. 321; *Chamberlain* v. *Napier*, (1880) 15 Ch. D. 614, 631; and *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202, 207, applied.

The English equitable rule against clogging the equity of redemption of a mortgage applies to an English contract for an issue of mortgage debentures to secure a loan and will be enforced by the English Courts against a contracting party in the jurisdiction although the floating security to be created by the debentures comprises foreign land, where the clog doctrine is possibly not recognized.

Noakes & Co. v. *Rice*, [1902] A. C. 24, 34; *Bradley* v. *Carritt*, [1903] A. C. 253, 261; and *Samuel* v. *Jarrah Timber and Wood Paving Corporation*, [1904] A. C. 323 (clog cases); and *Penn* v. *Lord Baltimore*, (1750) 1 Ves. Sen. 444; 1 W. & T. L. C., 7th ed. p. 755; *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.*, [1892] 2 Ch. 303; *Ex parte Pollard*, (1840) Mont. & Ch. 239; 4 Deac. 27; *Coote* v. *Jecks*, (1872) L. R. 13 Eq. 597; *Hicks* v. *Powell*, (1869) L. R. 4 Ch. 741; and *Ex parte Holthausen*, (1874) L. R. 9 Ch. 722 (jurisdiction in personam cases), applied.

Semble, the doctrine of ultra vires does not apply to a chartered company. Such a company has all the powers of a private person, and acts done in breach of its charter, though a ground for revocation by scire facias, are nevertheless valid.

Sutton's Hospital Case, (1612) 10 Rep. 1 a, 30 b; *Riche* v. *Ashbury Railway Carriage and Iron Co.*, (1874) L. R. 9 Ex. 224, 263, 292; and *Baroness Wenlock* v. *River Dee Co.*, (1883) 36 Ch. D. 675, n., 685, n., applied.

ACTION.

The plaintiff company was incorporated by Royal charter dated October 29, 1889, for the purpose of carrying into effect

divers concessions and agreements and carrying on operations in South Africa and for other purposes in the charter mentioned.

The charter recited that the company desired to carry into effect divers concessions and agreements made by certain of the chiefs and tribes inhabiting the region of South Africa lying to the north of Bechuanaland and to the west of Portuguese East Africa, and such other concessions, agreements, grants, and treaties as the company might thereafter obtain within the said region or elsewhere in Africa, and provided (clause 1) that the principal field of the operations of the company should be the region of South Africa lying immediately to the north of British Bechuanaland and to the north and west of the South African Republic and to the west of the Portuguese dominions; (clause 2) that the company was thereby empowered to hold and retain the full benefit of the said concessions and agreements; (clause 3) that the company was thereby further empowered, subject to the approval of the Secretary of State, from time to time to acquire by any concession, agreement, grant, or treaty all or any rights, interests, authorities, jurisdictions, and powers of any kind or nature whatever, including powers necessary for the purposes of government and the preservation of public order in or for the protection of territories, lands, or property comprised or referred to in the concessions and agreements made as aforesaid or affecting other territories, lands, or properties in Africa or the inhabitants thereof, and to hold, use, and exercise such territories, lands, property, rights, interests, authorities, jurisdictions, and powers respectively for the purposes of the company and on the terms of the charter; (clause 6) that the company should always be and remain British in character and domicil, and should have its principal office in Great Britain, and the company's principal representative in South Africa; (clause 10) that the company should to the best of its ability preserve peace and order in such ways and manners as it should consider necessary, and might with that object make ordinances (to be approved by the Secretary of State), and might establish and maintain a force of police; (clause 11) that the company should discourage and abolish by degrees any system of slave trade or domestic servitude; (clause 12) that the company should regulate the traffic in

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intoxicating liquors, so as, as far as practicable, to prevent the sale to natives; (clause 13) that the company should not interfere with any religion except so far as might be necessary in the interest of humanity; (clause 14) that in the administration of justice regard should be had to the customs and laws of the tribes; (clause 17) that the company should furnish annually to the Secretary of State accounts of its "expenditure for administrative purposes, and of all sums received by it by way of public revenue, as distinguished from its commercial profits," and should also before the commencement of each financial year furnish "an estimate of its expenditure for administrative purposes, and of its public revenue (as above defined) for the ensuing year." The charter proceeded as follows:

Clause 20. "Nothing in this our charter shall be deemed to authorize the company to set up or grant any monopoly of trade; provided that the establishment of or the grant of concessions for banks, railways, tramways, docks, telegraphs, waterworks, or other similar undertakings, or the establishment of any system of patent or copyright approved by our Secretary of State, shall not be deemed monopolies for this purpose . . . ."

Clause 22. "The company . . . . shall provide such Courts and other requisites as may from time to time be necessary for the administration of justice."

Clause 23. "The original share capital of the company shall be 1,000,000*l.* divided into 1,000,000 shares of 1*l.* each."

Clause 24. "The company is hereby further specially authorized and empowered for the purposes of this our charter from time to time—

"I. To issue shares of different classes or descriptions, to increase the share capital of the company, and to borrow moneys by debentures or other obligations."

"III. To establish or authorize banking companies and other companies, and undertakings or associations of every description, for purposes consistent with the provisions of this our charter."

"IV. To make and maintain roads railways telegraphs harbours and any other works which may tend to the development or improvement of the territories of the company.

"V. To carry on mining and other industries, and to make concessions of mining forestal or other rights."

"VIII. To grant lands for terms of years or in perpetuity, and either absolutely, or by way of mortgage or otherwise."

"XII. To carry on any lawful commerce, trade, pursuit, business, operations, or dealing whatsoever in connection with the objects of the company."

Clause 25 provided for the execution of a deed of settlement which was subsequently executed on February 3, 1891. Article 115 provided that its provisions were "to be deemed to be subject to and fully controlled by the provisions of the charter." The terms of this deed and of a supplemental charter of June 8, 1900, and a supplemental deed of May 1, 1901, are not material to this report.

The defendant company was a company registered and incorporated under the limited liability laws of the Colony of the Cape of Good Hope, having its head office at Kimberley in that Colony. In stating the following documents the two companies have been simply called the plaintiff company and the defendant company instead of the names actually appearing in those documents.

By an agreement made April 20, 1892, between the plaintiff company of the one part and the defendant company of the other part, after reciting that the plaintiff company was indebted to the defendant company in the sum of 80,500*l.* and that the plaintiff company contemplated an issue of first mortgage debentures to be secured by a trust deed specifically charging the plaintiff company's mineral and land rights in South Africa, but the time and amount of that issue had not yet been determined by the plaintiff company, and reciting that the plaintiff company had applied to the defendant company for further advances, it was mutually agreed as follows:

"1. The defendant company shall on the execution hereof advance to the plaintiff company 3500*l.* and on the first day of each calendar month of the present year the further sum of 3500*l.* so that the total advances by the defendant company to the plaintiff company shall (including the said sum of 80,500*l.*) amount to 112,000*l.* by December 1, 1892, inclusive.

"2. The plaintiff company shall repay the defendant company

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in London the said advances of 112,000*l.* on January 1, 1893, with interest at the rate of 6*l.* per cent. per annum upon the aforesaid moneys so to be advanced as aforesaid such interest to be calculated from the date of the respective advances until repayment of the said 112,000*l.*

"3. The plaintiff company shall not incur liabilities (including the said 112,000*l.*) exceeding 200,000*l.* during the currency of this agreement but excluding the amount of certain bills of exchange secured by a charge on the plaintiff company's unpaid capital called and uncalled.

"4. In the event of the plaintiff company determining to make an issue of debentures as contemplated the defendant company shall be entitled to require debentures part of such issue to be issued to it at whatever may be the rate of issue in satisfaction of the said 112,000*l.* and accrued interest thereon and if the defendant company do so require the plaintiff company shall as to its diamondiferous ground south of the Zambesi enter into an agreement with the defendant company to the effect of the clause scheduled hereto.

"5. Should there be no issue of debentures by the plaintiff company as aforesaid or there being such issue the defendant company do not exercise the power given to it by the preceding clause but desire to have the benefit of the said scheduled clause the defendant company shall be entitled to decline to take repayment of the said 112,000*l.* which shall accordingly be retained by the plaintiff company and carry interest at the rate of 6*l.* per cent. per annum and the defendant company shall be entitled so to decline for a period of five years and if the defendant company do so decline for such period then at the end thereof (whether payment of the said 112,000*l.* be or be not then demanded by the defendant company) the defendant company shall become entitled to the benefit of the said scheduled clause in perpetuity. During the said period of five years or such part of it as the defendant company decline to take repayment of the said 112,000*l.* the defendant company shall be entitled to the said scheduled clause if diamondiferous ground should be found during such period. Nothing in this clause shall prevent the defendant company in the absence of any other agreement

requiring repayment of the 112,000*l.* on the said January 1, 1893, but in this case it shall lose all right to the benefit of the said scheduled clause.

"6. Should any diamondiferous ground belonging to the plaintiff company have been or be discovered during the current year the defendant company shall immediately become entitled to the benefit of the said scheduled clause as respects such diamondiferous ground.

"7. If the plaintiff company shall in breach of this agreement incur liabilities exceeding 200,000*l.* during the currency of this agreement the defendant company shall become immediately entitled to all moneys advanced by it to the plaintiff company and to the benefit of the said scheduled clause in perpetuity.

"8. No alteration shall be made in the terms of this agreement without the consent of a majority of the whole of the directors of the defendant company whether in Kimberley or London."

The scheduled clause was as follows:

"The plaintiff company shall grant the defendant company exclusive licence to work all the plaintiff company's diamondiferous ground in the plaintiff company's territories south of the Zambesi at the same royalty and on the same conditions as diamondiferous ground is now worked in the Du Toits Pan and Bultfontein mines the property of the London and South African Exploration Company Limited save that besides the above royalty the defendant company shall pay to the plaintiff company two per cent. on the gross receipts the defendant company may derive on sale of diamonds acquired under this agreement

"Provided nevertheless that the defendant company shall be at liberty to determine at any time within two years after any alleged diamond mine is discovered to disclaim the benefit and obligation of this clause in respect of such alleged diamond mine."

No issue of first mortgage debentures was made under this agreement, nor did the defendant company decline under clause 5 to take repayment of the 112,000*l.* for a period of five years, so that in fact the defendant company never became entitled to the benefit of the scheduled clause.

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By an agreement made December 7, 1892, between the plaintiff company of the one part and the defendant company of the other part, supplemental to "the principal agreement" of April 20, 1892, after reciting that pursuant to the terms of the principal agreement the defendant company would before December 31, 1892, have advanced to the plaintiff company 112,000*l.*, and reciting that in connection with the construction of the railway from Vryburg to Mafeking, South Africa, and its general operations the plaintiff company contemplated an issue of first mortgage debentures for 750,000*l.*, to bear interest at the rate of 6*l.* per centum per annum, and had applied to the defendant company to accept an issue at par of first mortgage debentures, part of such issue, in payment or satisfaction of the said 112,000*l.*, and also in view of the construction of a railway from Vryburg to Mafeking to lend to the plaintiff company a further sum of 100,000*l.* to be secured by an issue at par of first mortgage debentures, further part of the said issue, and the defendant company had agreed to comply with such request and application on the terms thereinafter mentioned, it was mutually agreed as follows:

"1. The said 112,000*l.* shall not be repaid by the plaintiff company as provided by the principal agreement but shall continue on loan from the defendant company to the plaintiff company until the said first mortgage debenture issue is made by the plaintiff company and shall carry interest at the rate of 6*l.* per centum per annum until the date when interest on the said first mortgage debentures commences to run.

"2. Upon the said first mortgage debenture issue being made the plaintiff company shall allot and issue to the defendant company first mortgage debentures part of such issue of the nominal value of 112,000*l.*

"3. The first mortgage debentures for 750,000*l.* and interest thereon at the rate of 6*l.* per centum per annum shall be secured by a floating charge upon the entire assets and undertaking of the plaintiff company and such further and better charge on 2000 square miles (part of 6000 square miles and undivided therefrom) of land in British Bechuanaland to which the plaintiff company is now entitled (the Cape Colony being entitled to the

remaining 4000 square miles) and on 6000 square miles of land in British Bechuanaland to which the plaintiff company will become entitled on the completion of the said railway from Vryburg to Mafeking as is hereinafter mentioned. The said floating charge shall be so framed that the plaintiff company shall be at liberty in the course of its business and operations and for the purpose of carrying on the same to manage deal with work and turn to account by sale lease or otherwise such assets as it may deem expedient provided that the plaintiff company does not and is not at liberty to execute any mortgage or other charge in priority to the security to be constituted by the said first mortgage debentures for 750,000*l.* and interest thereon as aforesaid.

"4. On the allotment and issue of the said first mortgage debentures for the nominal value of 112,000*l.* and against delivery of such debentures by the plaintiff company to the defendant company and payment of interest on the said sum of 112,000*l.* at the rate of 6*l.* per centum per annum to the date when interest on the said debentures commences to run the defendant company shall deliver to the plaintiff company a receipt in full discharge for the said 112,000*l.* and all interest thereon to the date when interest on the said debentures commences to run.

"5. The further advance of 100,000*l.* shall be made by the defendant company to the plaintiff company as and when required by the plaintiff company against delivery of debentures for an equivalent amount provided nevertheless that the defendant company shall not be required to advance more per month on the average than 10,000*l.* and that only as funds are wanted for the purposes of the construction of the said railway from Vryburg to Mafeking.

"6. In consideration of the assistance rendered and to be rendered by the defendant company to the plaintiff company as appearing in the principal agreement and this agreement the plaintiff company shall grant the defendant company exclusive licence to work all the diamondiferous ground to which the plaintiff company is or may become entitled in the territories to which it now is or may become entitled or in which it now carries

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on or may carry on operations whether north or south of the river Zambesi such exclusive licence to be at the same royalty and on the same conditions as diamondiferous ground is now worked in the Du Toits Pan and Bultfontein mines the property of the London and South African Exploration Company Limited save that besides the above royalty the defendant company shall pay to the plaintiff company two per cent. on the gross receipts the defendant company may derive on sale of diamonds acquired under this provision or of the terms of the principal agreement. Provided nevertheless that the defendant company shall be at liberty to determine at any time within two years after any alleged diamond mine is discovered to disclaim the benefits and obligations of this clause in so far as respects any such alleged diamond mine.

"7. As further consideration the plaintiff company shall procure provision in connection with freight and traffic arrangements of the said railway from Vryburg to Mafeking for the carriage on and by such railway in perpetuity of wood and fuel for use by the defendant company in its mineral operations at a rate not exceeding one penny per ton per mile.

"8. In the event of the plaintiff company increasing its capital beyond 2,000,000 shares the holders of first mortgage debentures so to be issued by the plaintiff company shall have the same pro rata right to subscribe for such increased capital as the shareholders of the plaintiff company existing at the time of the issue of such increased capital.

"9. In the event of the plaintiff company forming a separate railway company to construct and work the said railway from Vryburg to Mafeking the interest it acquires in such railway company shall as and when received be appropriated specifically to the service of the said first mortgage debentures for 750,000*l.* and interest as aforesaid.

"10. This agreement is conditional on the plaintiff company obtaining all mineral rights within the British Bechuanaland Protectorate subject only to any mineral rights if any acquired over such territory prior to October 30, 1889, and not now belonging to the plaintiff company.

"11. If this agreement shall not become binding then the right

of the defendant company under the principal agreement as respects the 112,000*l.* herein mentioned shall remain in full force."

This supplemental agreement was made with the consent of the majority of the directors of the defendant company within clause 8 of the principal agreement.

The conditions of clause 10 of the supplemental agreement had been fulfilled, so that clause 11 never came into operation. One of the Bultfontein Mine conditions referred to in clause 6 was for the renewal of the licence every five years in perpetuity on paying a 10*s.* fine. The plaintiff company was in fact entitled to diamondiferous ground within the meaning of clause 6.

On June 27, 1894, the plaintiff company executed a trust deed to secure an issue of 250,000*l.* mortgage debentures and 500,000*l.* mortgage debenture stock, making 750,000*l.*, all ranking pari passu. The trust deed gave a specific charge on 1989 fully-paid 1*l.* shares in the Bechuanaland Railway Company, Limited, which had been transferred to the trustees by the plaintiff company, and a floating charge on the whole undertaking and property of the plaintiff company present and future, including its uncalled capital, but excepting the administrative powers, authorities, jurisdictions, and duties and revenues of the plaintiff company.

The principal and interest were made repayable in London, but on the request of the holder the interest might be paid at some bank or office in Cape Town, South Africa, approved by the plaintiff company. Certain powers were conferred on meetings of holders of debentures and debenture stock, which meetings were to be convened upon seven days' notice at the least. This notice was to be given by advertising the same twice in *The Times* and once in one other London daily newspaper. The three trustees were English trustees with addresses in England. No time was fixed for repayment, but the debentures were redeemable at 10 per cent. premium on six months' notice.

Neither of the agreements of 1892, nor the trust deed nor the debentures, nor any other instrument to the benefit of which the holders of the debentures were entitled, was or were ever

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registered in the deeds registry in Rhodesia or elsewhere in Rhodesia.

In pursuance of the agreements of 1892, sums to the amount of 212,000*l.* (including the 80,500*l.*) were from time to time advanced by the defendant company to the plaintiff company. Debentures to an amount exceeding 212,000*l.*, part of the above issue of 250,000*l.*, were issued by the plaintiff company to the defendant company in pursuance of the said agreements. They were sold by the defendant company in the market and were paid off by the plaintiff company before the end of 1896. After 1896 no sums remained and no sums now remained due or owing from the plaintiff company to the defendant company in respect of either of the said agreements or of any advances made in pursuance thereof.

As, however, the defendant company claimed that it was still entitled to an exclusive licence under clause 6 of the agreement of December 7, 1892, the plaintiff company brought this action for a declaration that the two agreements of 1892 in so far as they purported to confer on the defendant company the right to the grant by the plaintiff company of an exclusive licence to work diamondiferous ground in the plaintiff company's territories were ultra vires the plaintiff company and void; alternatively a declaration that the stipulations in the said agreements so far as they purported to entitle the defendant company to the grant of such exclusive licence after payment off of all sums advanced in pursuance of the agreements were not binding in equity on the plaintiff company; and alternatively a declaration that upon the true construction of the agreements the defendant company was entitled to such exclusive licence only so long as any moneys remained due to the defendant company thereunder, and that it was not now entitled to the grant of such exclusive licence.

The plaintiff company's case on its claim and particulars was based on three alternative grounds, namely, (*a*) that the agreements were ultra vires; (*b*) that they were a clog on the equity of redemption; (*c*) that they ceased on repayment.

The questions for argument were:—(*a*) Were the agreements forbidden by the charter? (*b*) If so, were they void, as ultra

vires? (*c*) Were they to be governed by English law, or were they to be governed by Rhodesian law, which was English north of the Zambesi and Roman-Dutch south of the Zambesi, where most of the diamondiferous ground was situate? (*d*) If governed by English law, did they constitute a clog on the equity of redemption? (*e*) If governed by Roman-Dutch law in territories south of the Zambesi, were they void by that local law? This question was not decided, and the arguments are omitted.

Levett, K.C., *W. E. Hollams*, and *G. H. Allen*, for the plaintiff company. The agreements create an exclusive licence to work all the diamond ground in the plaintiff company's territories. This is a monopoly forbidden by clause 20 of the charter. The exceptions shew that the word "monopoly" includes commercial undertakings created under the plaintiff company's commercial powers and is not confined to monopolies granted under its administrative powers. For Lord Coke's definition of monopoly see 3 Inst. 181, or Stroud's Judicial Dictionary, 2nd ed., vol. 2, p. 1221. The plaintiff company could grant a licence over a defined area, but a licence over all its territories is a monopoly.

[SWINFEN EADY J. Assuming you are right, the Crown may revoke your charter, but the agreements are valid: *Sutton's Hospital Case* (1); *Riche* v. *Ashbury Railway Carriage and Iron Co.* (2); *Baroness Wenlock* v. *River Dee Co.* (3); Buckley on Companies, 9th ed. p. 11.]

Those dicta are founded on Lord Coke's notes in *Sutton's Hospital Case*. (1) He cites the Year Book Trinity 22 Edw. 4 for his proposition, but no such passage exists. He was really referring to the Year Book Mich. 21 Edw. 4, folio 55, pl. 28, which does not bear out his proposition. See Grant on Corporations, pp. 13, 19, 131. The dicta in *Riche* v. *Ashbury Railway Carriage and Iron Co.* (2) were not mentioned in the House of Lords. (4) In *Ward* v. *Society of Attornies* (5) a chartered company was restrained from acting ultra vires.

(1) 10 Rep. 1a, 30b.
(2) L. R. 9 Ex. 224, 263, 292.
(3) 36 Ch. D. 675, n., 685, n.
(4) (1875) L. R. 7 H. L. 653.
(5) (1844) 1 Coll. 370, 380.

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[SWINFEN EADY J. That was an interlocutory injunction to keep matters in statu quo till the hearing. But Knight Bruce V.-C. says: "I could not allow the property to be so importantly affected before the hearing of the cause. It seems to me, that to do so would, in the strongest sense of the term, be an irremediable act. How could I, or any Court in the kingdom, restore these plaintiffs to their original position, if the act now sought to be restrained were done?" He evidently thought the act would be effectual even if in breach of the charter.]

Not necessarily. It is a common practice to restrain ultra vires acts, though they are ineffectual.

If the agreements are not ultra vires they are nevertheless void by reason of the clog on the equity of redemption, assuming, as the defendant company contends, that they continue in force after repayment of the loan. Of course, if they cease on repayment, cadit quæstio, as the loan has been repaid. They were made in London in English form by an English company with a company domiciled in Cape Colony. The money was to be advanced and repaid in England. The debentures creating a floating security were to be issued in England. The parties clearly intended the agreements to be governed by English law, though part of the land charged is in Southern Rhodesia, where Roman-Dutch law prevails. That intention determines the proper law of the contract: Dicey on the Conflict of Laws, 2nd ed. pp. 529, 572, 810; *Lloyd* v. *Guibert* (1); *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (2); *Jacobs* v. *Crédit Lyonnais* (3); *In re Fitzgerald* (4); *Hamlyn & Co.* v. *Talisker Distillery.* (5) Various circumstances are of course taken into consideration to determine intention, e.g., the lex loci contractus: *Lloyd* v. *Guibert* (1); the fact that it relates to foreign land: *Lloyd* v. *Guibert* (1); the question under which law the contract would be valid: *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (6); *Hamlyn & Co.* v. *Talisker Distillery* (5); *South African Breweries* v. *King* (7); but

(1) L. R. 1 Q. B. 115, 120, 122.
(2) 10 Q. B. D. 521, 540.
(3) 12 Q. B. D. 589, 600.
(4) [1904] 1 Ch. 573, 587.
(5) [1894] A. C. 202.
(6) 3 Moo. P. C. (N.S.) 272, 292.
(7) [1899] 2 Ch. 173.

the intention prevails even if it destroys the contract: *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega* (1); Westlake's Private International Law, 4th ed., pp. 281, 285.

If the English law applies there is a clear clog on the equity of redemption: *Biggs* v. *Hoddinott* (2); *Noakes & Co.* v. *Rice* (3); *Bradley* v. *Carritt* (4); *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (5); and the clog doctrine being a personal equity will be enforced even in the case of foreign land, unless the equity is repugnant to the express foreign law, or the foreign Courts have already assumed jurisdiction: *Ex parte Pollard* (6); *Campbell* v. *Dent* (7); *Penn* v. *Lord Baltimore* (8); *Lord Cranstown* v. *Johnston* (9); *Cood* v. *Cood* (10); *Ex parte Holthausen* (11); *Bank of Africa* v. *Cohen* (12); *Paget* v. *Ede* (13); *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.* (14); *Duder* v. *Amsterdamsch Trustees Kantoor.* (15) Conversely the English Court will not enforce a foreign contract in contravention of justice or morality: *Kaufman* v. *Gerson* (16); Westlake's Private International Law, 4th ed. pp. 213, 283; Foote's Private International Law, 3rd ed. p. 201.

Upjohn, K.C., Jenkins, K.C., and *J. W. M. Holmes,* for the defendant company. The agreements are not forbidden by the charter. Clause 20 does not apply to an exclusive grant by the plaintiff company as private owner. It is merely directed against a monopoly in the strict sense created under the plaintiff company's political or administrative powers, i.e., such a monopoly as is defined in 3 Inst. 181. See also the *Case of Monopolies* (17); the *Ipswich Tailors' Case.* (18) The exceptions in clause 20, such as railways, patents, copyrights, point to

(1) [1902] 2 K. B. 384.
(2) [1898] 2 Ch. 307.
(3) [1902] A. C. 24, 32.
(4) [1903] A. C. 253.
(5) [1904] A. C. 323.
(6) Mont. & Ch. 239; 4 Deac. 27, 275, 285.
(7) (1838) 2 Moo. P. C. 292.
(8) 1 Ves. Sen. 444; 1 W. & T L. C., 7th ed. p. 755.
(9) (1796) 3 Ves. 170.
(10) (1863) 33 Beav. 314.
(11) L. R. 9 Ch. 722.
(12) [1909] 2 Ch. 129.
(13) (1874) L. R. 18 Eq. 118.
(14) [1892] 2 Ch. 303.
(15) [1902] 2 Ch. 132.
(16) [1904] 1 K. B. 591.
(17) (1602) 11 Rep. 84b.
(18) (1614) 11 Rep. 53a.

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prerogative monopolies, quite independent of the plaintiff company's private ownership. The present agreements merely grant an exclusive licence over the plaintiff company's private land.

Even if forbidden by the charter the agreements are valid, though the charter may be revocable on a scire facias: *Sutton's Hospital Case* (1); *Riche* v. *Ashbury Railway Carriage and Iron Co.* (2); *Baroness Wenlock* v. *River Dee Co.* (3); *Smith* v. *Barrett* (4); *Ward* v. *Society of Attornies* (5); Buckley on Companies, 9th ed. p. 11; Kyd on Corporations, vol. i. pp. 69, 108. In the face of these authorities the passages in Grant on Corporations may be disregarded.

The proper law of the contract no doubt depends on the intention of the parties—*Lloyd* v. *Guibert* (6); *Jacobs* v. *Crédit Lyonnais* (7)—who may intend different laws to apply to different parts of it: *In re Fitzgerald* (8); *Hamlyn & Co.* v. *Talisker Distillery* (9); *Chamberlain* v. *Napier.* (10) The fact that it relates to foreign land and the question of local validity have a very important bearing on the question of intention: *Lloyd* v. *Guibert* (6); *Hamlyn & Co.* v. *Talisker Distillery* (9); *In re Missouri Steamship Co.* (11) In *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega* (12) there was an express stipulation that the parties were to be bound by English law, so that there was no room for any presumption of intention.

The plaintiff company is no doubt an English company, but its sphere of operations is in South Africa. The defendant company is registered at the Cape and has a similar sphere of operations. It does not really appear where the contracts were made, but they provide for three distinct things—(*a*) loan; (*b*) security; (*c*) licence; and different laws may well apply. As to the contract of loan there is no conflict of law. The contract for the security raises a conflict. The April agreement contemplated a specific and the December agreement a floating

(1) 10 Rep. 1a, 30b.
(2) L. R. 9 Ex. 224, 263, 292.
(3) 36 Ch. D. 675, n., 685, n.
(4) (1663) 1 Sid. 161.
(5) 1 Coll. 370, 380.
(6) L. R. 1 Q. B. 115, 120, 122.
(7) 12 Q. B. D. 589, 600.
(8) [1904] 1 Ch. 573, 587.
(9) [1894] A. C. 202.
(10) 15 Ch. D. 614.
(11) 42 Ch. D. 321.
(12) [1902] 2 K. B. 384.

charge on South African land. But they both contemplated a valid charge, i.e., a charge in accordance with the lex situs, which in Southern Rhodesia requires registration. They also contemplated an effectual licence under the local law. Surely, therefore, South Africa is the place with which the transaction has the most real connection and the local law applies: *South African Breweries, Ld.* v. *King* (1); *Waterhouse* v. *Stansfield.* (2)

Assuming, however, that the agreements are governed by English law, the clog doctrine does not apply. In the first place the transaction was not a mortgage at all. It was a purchase of debentures giving a right to an annuity commutable by the plaintiff company for a fixed amount: *Attree* v. *Hawe* (3); *In re Southern Brazilian Rio Grande Do Sul Ry. Co.* (4); *City of London Brewery Co.* v. *Inland Revenue Commissioners* (5); *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (6); Buckley on Companies, 9th ed. pp. 245, 258. The old debt was cancelled and the parties could bargain as they pleased: *Reeve* v. *Lisle.* (7) Secondly, if the transaction was a mortgage the debentures and the floating charge were on the terms of the agreements subject to our licence, so that when paid off the plaintiff company got back the very property mortgaged. Thirdly, the agreement to grant the licence was an independent transaction. Fourthly, in Southern Rhodesia the agreements created no charge for want of registration. The case does not therefore fall within the clog doctrine, which is not very intelligible and ought not to be extended: *Samuel* v. *Jarrah Timber and Wood Paving Corporation.* (6)

If, however, there is a clog according to English law, it will not be enforced in the case of foreign land. The right to redeem is not a mere personal right. It is an equitable estate or interest in the property mortgaged: *Casborne* v. *Scarfe.* (8) A clog or fetter on this right is in the same category. It is either an equitable estate or a limitation or condition affecting an

(1) [1899] 2 Ch. 173.
(2) (1851) 9 Hare, 234; (1852) 10 Hare, 254.
(3) (1878) 9 Ch. D. 337.
(4) [1905] 2 Ch. 78.
(5) [1899] 1 Q. B. 121.
(6) [1904] A. C. 323.
(7) [1902] A. C. 461.
(8) (1737) 1 Atk. 603; 2 W. & T. L. C., 7th ed. p. 6.

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equitable estate : *Santley* v. *Wilde* (1); *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (2); *Jennings* v. *Ward* (3); *London and South Western Ry. Co.* v. *Gomm.* (4) This is exactly the class of equity that the Court does not enforce in the case of foreign land: *Norton* v. *Florence Land and Public Works Co.* (5); *Martin* v. *Martin* (6); *In re Fitzgerald* (7); *Bank of Africa* v. *Cohen* (8); Dicey on the Conflict of Laws, 2nd ed. pp. 500, 510, 810. The cases of *Ex parte Pollard* (9), *Ex parte Holthausen* (10), *Cood* v. *Cood* (11), *Paget* v. *Ede* (12), and *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.* (13) were all instances of exercising jurisdiction in personam, which is the only ground of jurisdiction in these cases: *Ewing* v. *Orr Ewing* (14); *Lord Portarlington* v. *Soulby* (15); *Norris* v. *Chambres.* (16) *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (17) turned on special facts, and in *Campbell* v. *Dent* (18) no question arose as to the land laws.

The plaintiff company's case therefore fails, and on the counter-claim we are entitled to specific performance.

Levett, K.C., in reply. If, as we contend, the agreements are forbidden by the charter, they are ultra vires and void: Lindley on Companies, 6th ed. p. 214.

There can be only one proper law of a contract. Of course there can be two contracts in one document, as in *Chamberlain* v. *Napier* (19), but one contract cannot be governed by the different local laws applicable to its different subject-matter, though naturally the machinery of transfer and registration necessary to carry out the contract must conform to the local law.

An issue of debentures may no doubt be a sale and purchase

(1) [1899] 2 Ch. 474.
(2) [1904] A. C. 323.
(3) (1705) 2 Vern. 520.
(4) (1882) 20 Ch. D. 562.
(5) (1877) 7 Ch. D. 332.
(6) (1831) 2 Russ. & My. 507.
(7) [1904] 1 Ch. 573, 587.
(8) [1909] 2 Ch. 129.
(9) Mont. & Ch. 239; 4 Deac. 27, 275, 285.
(10) L. R. 9 Ch. 722.
(11) 33 Beav. 314.
(12) L. R. 18 Eq. 118.
(13) [1892] 2 Ch. 303.
(14) (1883) 9 App. Cas. 34.
(15) (1834) 3 My. & K. 104.
(16) (1861) 29 Beav. 246; 3 D. F. & J. 583.
(17) 3 Moo. P. C. (N.S.) 272, 292.
(18) 2 Moo. P. C. 292.
(19) 15 Ch. D. 614, 631.

transaction, but the present transaction was clearly an equitable mortgage even on the Southern Rhodesian land, and the security was not subject to the licence. The clog doctrine therefore applies.

With one exception the jurisdiction in personam is exercised in the case of foreign land where the equity is not repugnant to the express foreign law and the foreign Courts have not assumed jurisdiction. The exception is where the equity is merely based on the English doctrine of notice: Westlake's Private International Law, 4th ed. pp. 211, 214, 285; Ashburner on Mortgages, pp. 386, 520. The exception is illustrated by *Norton* v. *Florence Land and Public Works Co.* (1), *Martin* v. *Martin* (2), and *Norris* v. *Chambres* (3), which were all notice cases. *Bank of Africa* v. *Cohen* (4) turned on capacity.

As to the counter-claim the agreements are void for uncertainty and perpetuity, and even if they are not void as ultra vires they are a direct breach of the plaintiff company's contract with the Crown. The Court does not enforce specific performance of a contract involving a breach of a prior contract: Fry on Specific Performance, 4th ed. p. 178; *Willmott* v. *Barber* (5); *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (6) Lastly, as he who comes into equity must do equity, the defendant company cannot obtain the equitable relief of specific performance without giving effect to the equitable clog doctrine.

Upjohn, K.C., in reply on the counter-claim. Uncertainty and perpetuity were not pleaded, but they are easily answered. As to uncertainty, Id certum est quod certum reddi potest. As to perpetuity, the agreements were personal contracts between the very parties now before the Court.

The breach (if any) of the charter gives the Crown a remedy by scire facias, but the charter is not a contract with the Crown within *Willmott* v. *Barber*. (5) The last point is merely the clog argument in another dress.

Cur. adv. vult.

(1) 7 Ch. D. 332.
(2) 2 Russ. & My. 507.
(3) 29 Beav. 246; 3 D. F. & J. 583.
(4) [1909] 2 Ch. 129.
(5) (1880) 15 Ch. D. 96.
(6) [1900] 2 Ch. 352; [1901] 2 Ch. 37.

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Feb. 10. SWINFEN EADY J. (after stating the nature of the case and the three points on which the plaintiff company relied in the claim and particulars). The questions therefore which I have to determine are whether the agreements are void as being ultra vires, or as amounting to a clog on the equity of redemption, and also whether, according to their true construction, they are intended to continue after repayment of all moneys advanced.

The plaintiff company's contention that the agreements are ultra vires is based upon clause 20 of the charter, which provides that "Nothing in this our charter shall be deemed to authorize the company to set up or grant any monopoly of trade." It contends that the exclusive licence is a "monopoly of trade" within the meaning of this clause. The defendant company disputes this contention, and moreover alleges that even if the grant in question were forbidden by the terms of the charter it would not be ultra vires for the plaintiff company to grant that exclusive licence, although it might be ground for a scire facias at the instance of the Attorney-General.

The charter was followed by a deed of settlement of the plaintiff company dated February 3, 1891, but this deed cannot extend the provisions of the charter, and indeed article 115 of the deed provides that the provisions of the deed are to be subject to and fully controlled by the provisions of the charter.

The charter confers very wide powers upon the company; these are divisible into two classes, administrative and commercial, and the distinction between them is clearly maintained throughout the charter. With regard to its administrative powers and duties, the company is to the best of its ability to preserve peace and order, and may establish and maintain a force of police; it is to discourage and abolish the slave trade and domestic servitude, and prevent the sale of liquor to natives; not to interfere with any religion, except so far as may be necessary in the interest of humanity; in the administration of justice the company is to have regard to the customs or laws of the tribes; to furnish to a Secretary of State annual accounts of its expenditure for administrative purposes, and of all sums received by way of public revenue as distinguished from its

commercial profits; also an estimate for the ensuing year of its expenditure for administrative purposes, and of its public revenue. The company is also to provide such Courts and other requisites as may from time to time be necessary for the administration of justice.

The charter then confers very wide commercial powers upon the company (including expressly a power to make concessions of mining rights), and it is specially authorized to carry on any lawful commerce, trade, pursuit, business, operations, or dealing whatsoever in connection with the objects of the company.

The charter also in terms empowers the company to hold and retain the full benefit of the concessions and agreements made by the chiefs and tribes therein referred to, and all the interests comprised in these concessions and agreements, and from time to time to acquire other rights and interests in other territories, lands, or property in Africa.

Thus the administrative duties and powers of the plaintiff company rest on the authority conferred by charter, while its proprietary rights were acquired from and through the chiefs and tribes.

It is in the exercise of its proprietary rights that it has agreed to grant the licence to mine for diamonds. It is not in dispute that the mines are vested in the plaintiff company, and that it can grant exclusive rights to any particular company or companies to work ascertained diamond fields, or to search for diamonds, and when diamondiferous ground is discovered to mine for the stones in defined areas, and, apparently, however large these areas may be; but the contention is that such a grant, if extending over the whole area of ground of which it is the owner and granted to only one company, is void as amounting to a monopoly, which by clause 20 of the charter it is forbidden to grant.

In my opinion this contention wholly fails. The provision of the charter is that the company is not authorized to set up or grant any monopoly of trade, and then follows a provision that the establishment of certain undertakings of a public nature, or the establishment of a system of patent or copyright, shall not be deemed monopolies for this purpose. This provision of the

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charter has not any application to the exercise by the plaintiff company of its proprietary rights. It is conceded that the plaintiff company may sell or lease certain portions of its diamondiferous ground, and that in those portions the purchaser or lessee would have sole and exclusive rights. He would have a monopoly of the diamonds within the limited area, but this would certainly not be a "monopoly of trade" within the meaning of the charter.

Lord Coke in the 3rd Institute, folio 181, thus defines a monopoly: "A monopoly is an institution, or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politick, or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politick, or corporate, are sought to be restrained of any freedom, or liberty that they had before, or hindred in their lawful trade." The *Case of Monopolies* (1), a grant to the plaintiff of the sole right of making playing cards, shews that monopolies as just defined are void by the common law of England, and it is to such monopolies that the charter refers; nothing in the charter is to be deemed to authorize them.

As, in my judgment, the agreements in question do not confer monopolies forbidden by the charter, it is not necessary to decide the question of ultra vires; but it must not be assumed that, if a chartered company does some act which it is forbidden to do by its charter, that act is necessarily void as ultra vires.

In *Riche* v. *Ashbury Railway Carriage and Iron Co.* (2) all the judges in the Exchequer Chamber agreed that a corporation at common law has as an incident given by law the same power to contract and subject to the same restrictions that a natural person has, although the Court was equally divided upon the question whether the acts which were ultra vires a statutory corporation were capable of ratification.

Blackburn J., in delivering the judgment of himself, Brett and Grove JJ., which so far as regards a statutory corporation was overruled by the House of Lords, referred to *Sutton's Hospital Case* (3) and said (4): "This seems to me an express

(1) 11 Rep. 84b.
(2) L. R. 9 Ex. 224.
(3) 10 Rep. 1a, 30b.
(4) L. R. 9 Ex. 263.

authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case. If there are conditions contained in the charter that the corporation shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by sci. fa. in the name of the Crown to repeal the letters patent creating the corporation: see *Eastern Archipelago Co.* v. *Reg.* (1) But if the Crown take no such steps, it does not, as I conceive, lie in the mouth either of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation. I am aware of no decision by which a corporation at common law has been permitted to do so. I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has."

Archibald J., in delivering the judgment of himself, Keating and Quain JJ., whose opinion as regards a statutory corporation ultimately prevailed in the House of Lords, said (2): "I admit that at common law (as was resolved in the case of *Sutton's Hospital* (3)), when a corporation is duly created all other incidents are tacite annexed, such as ability to purchase and alien, to sue and be sued, and to use what seal they will; and that even a clause in their charter restraining them from aliening or demising but in a certain form, though an ordinance testifying the desire of the Crown, is to be deemed but a precept and not binding in law, so that a corporation thus constituted acquires rights of contracting as extensive as those of a natural person."

In *Baroness Wenlock* v. *River Dee Co.* (4) Bowen L.J. says: "At common law a corporation created by the King's charter has, prima facie, and has been known to have ever since *Sutton's*

(1) (1853) 2 E. & B. 856.
(2) L. R. 9 Ex. 292.
(3) 10 Rep. 1a, 30b.
(4) 36 Ch. D. 675, n., 685, n.

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Hospital Case (1), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created."

At p. 11 of the 9th edition of his work on the Companies Acts Buckley L.J. states the law thus: "At common law a corporation created by charter can by its common seal bind itself to anything to which a natural person could bind himself, and can deal with its property as a natural person might deal with his own. So that not only can the chartered company bind itself by acts as to which no power is affirmatively given by the charter, but even if the charter by express negative words forbid any particular act, the corporation can nevertheless at common law do the act, and if it does it, is bound thereby, and the result is only that ground is given for a proceeding by scire facias in the name of the Crown, repealing the charter."

If it were necessary to determine the question, I should decide that the objection raised by the plaintiff company that the agreements are not binding because they are ultra vires wholly fails.

I now proceed to consider the construction of the agreements and the question whether the provision for a diamond mining licence is invalid as amounting to a clog on the equity of redemption.

By the agreement of April 20, 1892, the defendant company agreed to advance to the plaintiff company by instalments sums amounting in all to 112,000*l.*, and the plaintiff company agreed to repay the amount in London on January 1, 1893, with interest at 6 per cent. The agreement provides for various contingencies which did not happen. It refers to a contemplated issue of first

(1) 10 Rep. 1a, 30b.

mortgage debentures of a particular kind, which issue was not in fact made. It further provides (clause 5) that should there be no such issue, and should the defendant company desire to have the benefit of the clause set out in the schedule, namely, a clause whereby the plaintiff company were to grant to the defendant company an exclusive licence to work all the plaintiff company's diamondiferous ground in the plaintiff company's territories south of the Zambesi, then the defendant company should be entitled to decline to take repayment of the 112,000*l.* for a period of five years, and if the defendant company did so decline for five years, then at the end of the period it should become entitled to the benefit of the scheduled clause in perpetuity.

The defendant company did not, under this clause 5, decline to take repayment for five years. This agreement was superseded by one of December 7, 1892, under which the defendant company received some other debentures, and by the admissions the parties have agreed that these other debentures were paid off by the plaintiff company before the end of the year 1896, and that after the year 1896 no sums remained, and no sums now remain, owing from the plaintiff company to the defendant company in respect of either of the agreements or of any advances made in pursuance thereof. Therefore, in the events which have happened, the defendant company never became entitled to the scheduled clause, providing for the grant of a diamond mining licence, under the agreement of April 20, 1892.

The agreement of December 7, 1892, is made between the same parties and is expressed to be supplemental to that of April 20, 1892. It recites that the plaintiff company contemplated making an issue of 750,000*l.* first mortgage debentures and had applied to the defendant company to accept an issue at par of such debentures in satisfaction of the 112,000*l.*, and also to lend to the plaintiff company a further sum of 100,000*l.*, which the defendant company had agreed to do, on the terms thereinafter mentioned. The agreement then provides that the 112,000*l.* shall not be repaid as provided by the principal agreement, but the defendant company is to accept debentures of the same nominal amount, these first mortgage debentures to be secured by a floating charge upon the entire assets and undertaking of

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the plaintiff company and such further and better charge as was thereinafter mentioned on 2000 square miles of land in British Bechuanaland to which the plaintiff company was then entitled and on 6000 square miles of land in British Bechuanaland to which the plaintiff company would become entitled on the completion of the railway from Vryburg to Mafeking, the floating charge to be so framed that the plaintiff company should be at liberty in the course of its business and operations to manage, deal with, work, and turn to account, by sale, lease, or otherwise, such assets as it might deem expedient. Upon the allotment and issue of the 112,000*l.* debentures to the defendant company it was to deliver to the plaintiff company a receipt in full discharge for the 112,000*l.* and all interest. The next clause provides for the defendant company making a further advance of 100,000*l.* to the plaintiff company against delivery of debentures.

Then clause 6, which contains the provision for the diamond mining licence, is as follows: "(6.) In consideration of the assistance rendered and to be rendered by the defendant company to the plaintiff company as appearing in the principal agreement and this agreement the plaintiff company shall grant the defendant company exclusive licence to work all the diamondiferous ground to which the plaintiff company is or may become entitled, in the territories to which it now is or may become entitled, or in which it now carries on or may carry on operations, whether north or south of the river Zambesi, such exclusive licence to be at the same royalty and on the same conditions as diamondiferous ground is now worked in the Du Toits Pan and Bultfontein Mines, the property of the London and South African Exploration Company, Limited, save that besides the above royalty the defendant company shall pay to the plaintiff company 2 per cent. on the gross receipts the defendant company may derive on sale of diamonds acquired under this provision or of the terms of the principal agreement. Provided nevertheless that the defendant company shall be at liberty to determine at any time within two years after any alleged diamond mine is discovered to disclaim the benefits and obligations of this clause in so far as respects any such alleged diamond mine."

Clause 7 provides that as further consideration the plaintiff

company shall procure provision, in connection with freight and traffic arrangements of the railway from Vryburg to Mafeking, for the carriage by the railway in perpetuity of wood and fuel for use by the defendant company in its mineral operations at a rate not exceeding one penny per ton per mile.

Then follows a provision for debenture-holders having a right to subscribe for any increased capital of the plaintiff company; also a provision that if the plaintiff company should form a separate railway company to construct and work the railway from Vryburg to Mafeking the interest it acquired in that railway company should be appropriated specifically to the service of the debenture issue.

The agreement is by clause 10 expressed to be conditional upon the happening of a certain event, but the parties have admitted that this condition was fulfilled.

The last clause provides that if the agreement should not become binding, then the right of the defendant company under the principal agreement as respects the 112,000*l.* should remain in full force; but as it is admitted that the condition was fulfilled, the agreement did become binding, and this last clause never came into operation.

It appears from the admissions of the parties that on June 27, 1894, a trust deed was executed by the plaintiff company to secure an issue of 250,000*l.* debentures and 500,000*l.* debenture stock, making 750,000*l.*, all ranking pari passu. The trust deed recites the transfer to the trustees of 1989 fully-paid 1*l.* shares in the Bechuanaland Railway Company, Limited. Upon these shares the charge was a specific charge, but in all other respects it was a floating charge upon all the property of the plaintiff company, present and future, including its uncalled capital for the time being. The principal and interest were made repayable in London, and the coupons for interest on the debentures were payable in London, but at the request of the bearer or registered holder, as the case might be, the coupon was to be payable at some bank or office in Cape Town, South Africa, approved by the plaintiff company. Certain powers were conferred on meetings of holders of debentures and debenture stock, and these meetings were to be convened upon seven days' notice at the least, such notice

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being given by advertising the same twice in *The Times* newspaper and once in one other London daily newspaper. The three trustees were English trustees with addresses in England. The parties have admitted that neither the agreement of April 20, 1892, nor the agreement of December 7, 1892, nor the debentures or trust deed, nor any other instrument to the benefit of which the holders of the debentures were entitled, was or were ever registered in the deeds registry in Rhodesia or elsewhere in Rhodesia.

Although the trust deed is part of the history of the transaction, the terms of it do not appear to me to be material to any question arising in the action. It is the agreement of December 7, 1892, which is the important document and governs the transaction. As a matter of the construction of that document I am of opinion that the diamond mining licence mentioned in clause 6 was not intended to be confined to the duration of the security, and to terminate when the debentures were paid off. The agreement is expressed to be supplemental to the previous agreement; the conditions of the mining licence are the same in each case, although the former agreement related only to territories south of the Zambesi; clause 6 of the later agreement refers to the gross receipts of the defendant company either under that provision or under the terms of the principal agreement, which is expressed to be in perpetuity. Moreover, a licence and contemporary agreement in respect of a claim in the Bultfontein Mine were produced at the trial, shewing the royalty and terms and conditions of working, and one of the conditions is for renewal of the licence every five years, in perpetuity, on paying 10*s.* fine.

The real question, however, between the parties is whether the provision as to the diamond licence in the December agreement is void as being a clog on the equity of redemption, and in order to decide this question it is necessary to determine by what law the contracts are to be governed. The plaintiff company contends that the transaction as a whole is to be governed by English law, although the form and conditions of the licences must conform to the local law; while the defendant company contends that the law to be applied is that of South Africa, that is to say, the law in force in Rhodesia, which as

regards the territories south of the Zambesi River is the Roman-Dutch law, and as regards territories north of that river the English law. I gather that, so far as at present known, only lands south of the river contain diamonds.

In cases where a contract is not immoral, nor contrary to public policy, a solution of the question by what law the contract is to be governed is arrived at when it has been ascertained by what law the contracting parties intended it to be governed. It is open to the parties to stipulate in express terms that the law of a particular country shall apply. If they do so, that law is applicable. If there is no express stipulation the Court must arrive at a conclusion upon the materials before it as to the law with reference to which the parties contracted, and that law is to be applied. A broad rule has been laid down that prima facie the lex loci contractus presumably governs the nature, the obligation, and the interpretation of the contract, unless the contrary appears to be the express intention of the parties. But the terms in which this rule is itself stated shew that it yields to the intention of the parties. The problem is to ascertain from the agreement itself and the surrounding circumstances by what law the parties intended their contract to be governed. The law has been so laid down in many cases.

In *Lloyd* v. *Guibert* (1) the intention of the parties was really the crucial test.

In *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (2) Lindley L.J. pointed out that the real question was what was the intention of the parties.

In *Jacobs* v. *Crédit Lyonnais* (3) Bowen L.J. said that the rules laid down by juridical writers were only presumptions or prima facie rules, capable of being displaced wherever the clear intention of the parties could be gathered from the document itself and from the nature of the transaction. He then refers to the broad rule as I have stated it, and to the statement in *Lloyd* v. *Guibert* (1) that the lex loci ought to prevail in the absence of circumstances indicating a different intention, as for instance that the subject-matter is immovable property situate in another country ;

(1) L. R. 1 Q. B. 115, 120, 122. (2) 10 Q. B. D. 521, 540.
(3) 12 Q. B. D. 589, 600, 601.

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he states that it is obvious that the subject-matter of each contract must be looked at, as well as the residence of the contracting parties or the place where the contract is made. He then adds: "Again, it may be that the contract is partly to be performed in one place and partly in another. In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity: and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal."

The same principle—that the intention of the parties is to govern—was recently laid down by Cozens-Hardy L.J. in *In re Fitzgerald* (1) in this way: "As a general rule the law of the matrimonial domicil is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express stipulation that some other law shall apply . . . . It is not necessary that there should be an express stipulation. It is sufficient if the Court arrives at the conclusion that the parties in fact contracted with reference to some law other than that of the matrimonial domicil."

It thus appears clear that the law of the contract, or the law which the contract itself imports as the law governing the contract, is that which the contracting parties intended should govern and regulate it. In the absence of express stipulation, various ingredients or factors have from time to time been considered as of weight in arriving at the intention of the parties, but they are only matters to be taken into consideration and

(1) [1904] 1 Ch. 573, 587.

cannot of themselves be relied upon as absolutely determining the law of the contract. Thus, if a provision of the contract would be valid or effective according to one law and invalid or inoperative according to another law, that is a material fact in favour of the parties intending the contract to be governed by the law which will give effect to their bargain, rather than by a law which will consider it invalid and inoperative: *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (1); *In re Missouri Steamship Co.* (2); *Hamlyn & Co.* v. *Talisker Distillery.* (3) Again, another material matter to be considered in arriving at the intention of the parties is the fact that the contract relates to land situate abroad. This circumstance was pointed out in *Lloyd* v. *Guibert* (4) as indicating an intention to be bound by a law different from that of the place where the contract was made.

Again, different laws may apply to different parts of a contract if the parties so intend. In *Chamberlain* v. *Napier* (5), where there was one marriage contract, executed in Scotland, comprising English real property of the husband and personalty in Scotland belonging to the wife, Hall V.-C. says: "I quite agree with what was said in argument, that the provisions of the contract generally are of a Scotch character, but, notwithstanding that, there are portions of the contract which are separable from the remainder of it, and seem to me to contain an English contract, which was meant by the parties to it to be construed by and to operate under English law. There are, I think, circumstances which, as regards the husband's property and its destination, stamp the contract as English; and I think there is no difficulty on principle or in law, in holding that, in a contract framed as this is, a certain portion of it is to be treated and construed as English, while in all other respects it must be dealt with as Scotch."

It will be observed that Hall V.-C. dealt with the case upon the footing that there was one contract, and not, as was suggested, two contracts in one document.

(1) 3 Moo. P. C. (N.S.) 272, 292.
(2) 42 Ch. D. 321.
(3) [1894] A. C. 202.
(4) L. R. 1 Q. B. 122.
(5) 15 Ch. D. 614, 631.

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In *Hamlyn & Co.* v. *Talisker Distillery* (1) Lord Herschell says: "It is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined."

Applying these principles and turning to the contract itself, it is a contract between the plaintiff company, which is domiciled in England, and the defendant company, which is registered under the limited liability laws of the Colony of the Cape of Good Hope and has its head office at Kimberley. The contract itself is very English in form. The later agreement is expressed to be supplemental to the earlier agreement, which is referred to as the "principal agreement." The later agreement contemplates the issue of first mortgage debentures, an English form of security. It further provides that the charge shall be a floating charge upon the entire assets and undertaking of the plaintiff company and a further and better charge on 2000 square miles of land in British Bechuanaland to which the plaintiff company was then entitled and on 6000 square miles to which it would become entitled on the completion of the railway from Vryburg to Mafeking. This further charge is dealt with by clause 9 of the agreement, and it is apparently in pursuance of this provision that the 1989 shares in the Bechuanaland Railway Company, Limited, were transferred to the debenture trustees by way of specific charge. The floating charge is a charge well known in English law, and its nature has been determined here by judicial decision and modified by statute. The Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), provides for certain debts having priority over the claims of holders of debentures or debenture stock under any "floating charge" upon a winding-up, and upon any appointment of a receiver.

The contract was made in England—that is to say, the part of the contract sealed by the plaintiff company, which is the agreement by which it agreed to grant the diamond lease, was sealed in England. Although there is not any admission of the parties as to the place where the contract was made, I arrive at the

(1) [1894] A. C. 202, 207.

conclusion that the part by which the plaintiff company is bound was sealed in England from the fact that the seal of the plaintiff company affixed to the document contains the name of the plaintiff company without any addition, while the provision in the company's deed of settlement with regard to official seals abroad (article 100) empowers the directors to prepare for use in Africa, or in any other place out of the United Kingdom, an official seal bearing the name of the company, with the addition of the name of the territory, district, or place within which the seal is intended for use. Moreover, the date of the stamp on the document shews that it was stamped after execution before it could possibly have been received from South Africa. Again, the contract was, in part at all events, to be performed in England. The principal agreement expressly stipulates that the loan is to be repaid to the defendant company in London. The December agreement provides that the plaintiff company shall allot and issue to the defendant company first mortgage debentures of the nominal value of 112,000*l*. The allotment and issue contemplated are an allotment and issue in England of debentures valid according to English law. No debenture or other security was entered on any register in Rhodesia, and no actual charge on any specific land in Rhodesia created, but this was in accordance with the intention of the parties, as the plaintiff company was to be at liberty, for the purpose of carrying on its operations, to manage and deal with, by sale, lease, or otherwise, such assets as it might deem expedient. Registration of a mortgage in Rhodesia would have been inconsistent with a mere floating charge.

The defendant company claims that if the contract is invalid by English law, but valid by the Roman-Dutch law prevailing in Southern Rhodesia, this is a strong reason for holding that the parties intended it to be governed by the law which would give it validity; but in the present case this point loses much of its force, as the contract of December, 1892, embraces all diamondiferous ground, as well in Northern Rhodesia, where the English law prevails, as in Southern Rhodesia, which is governed by the Roman-Dutch system of jurisprudence.

In my opinion both the contracts of April and December, 1892, are English contracts, to be governed according to English

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law. It may well be that the form of the licences, and the rights thereunder, are to be in accordance with the local law of Northern and Southern Rhodesia respectively; the method and manner of performance abroad, so far as regards the grant of the licence, the form of it, and the rights conferred by it, are to be governed by the law of the place where the land is situate; but the questions with regard to the validity of the stipulations in the contract itself must, in my opinion, be governed by English law. In my judgment it was not the intention of the parties that the contracts of April or December should be governed by the laws in force either in Northern Rhodesia or Southern Rhodesia, but by English law. The truth probably is that, as the recent decisions on the doctrine of a clog had not been given when the agreements were entered into, that point was not present to the minds of either party.

The question then remains whether the stipulation for the diamond mining licence in the December, 1892, agreement is invalid, or at all events ceased to have any operation after all moneys had been repaid. That agreement provides for a further advance of 100,000*l.* being made by the defendant company to the plaintiff company, and that in consideration of the assistance rendered and to be rendered, as appearing in the principal agreement and that agreement, the plaintiff company shall grant to the defendant company the exclusive diamond licence. The question is, Does not this offend against the doctrine that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void?

In *Noakes & Co.* v. *Rice* (1) Lord Davey said, with regard to a stipulation being a clog or fetter on the right to redeem, "The principle is this—that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan."

There is no difficulty in the present case in arriving at the conclusion that the agreement to grant the mining licence was part of the mortgage transaction; it is so expressed upon the

(1) [1902] A. C. 24, 34.

face of the agreement. Certain distinctions were attempted to be drawn between that case and the present on the ground that, as no mortgage or debenture trust deed was ever registered in Rhodesia, no mortgage or charge on land there was ever obtained; also on the ground that the present was really a subscription of debentures, and not a loan of money secured by a mortgage or charge. But these distinctions are not real or substantial. An English debenture purporting to charge by way of floating security all the English company's property and assets does amount, where the English company possesses land abroad, to an agreement to charge that land, and is a valid equitable security according to English law; and the debenture-holders, upon any winding-up of that company, would rank as secured creditors in respect of the foreign land, and upon a winding-up in England they would be paid in full out of the proceeds of sale of that land, before any distribution of the proceeds of it was made among ordinary unsecured creditors.

The law on this point is correctly stated by Sir Francis Palmer in the 5th edition of Company Law at p. 236: "Even without complying with the formalities required by the local law in relation to transfers or mortgages, it is competent to a company to create an effective charge on property belonging to it in a foreign country, for the Court, in virtue of its Chancery jurisdiction in personam, enforces equities in regard to foreign land where the mortgagor company is within the jurisdiction (*Penn* v. *Lord Baltimore* (1); *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.*(2); Westlake, I. L. (1880), 183); and in determining whether there is an equity the Court regards English, not foreign, law, and if according to English law there is an equity, e.g., if for valuable consideration a company agrees to give a charge on foreign property, the Court will enforce it, although the equity may be one not recognized by the lex loci rei sitæ (*Ex parte Pollard* (3); *Coote* v. *Jecks* (4); *Hicks* v. *Powell* (5); *Ex parte Holthausen.* (6))"

(1) 1 Ves. Sen. 444; 1 W. & T. L. C., 7th ed. p. 755.
(2) [1892] 2 Ch. 303.
(3) Mont. & Ch. 239; 4 Deac. 27, 275, 285.
(4) L. R. 13 Eq. 597.
(5) L. R. 4 Ch. 741.
(6) L. R. 9 Ch. 722.

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The document of December, 1892, was an agreement raising such an equity; it was a contract for value to give an equitable charge on (amongst other property) land abroad.

Moreover, there are two decisions of the House of Lords upon the doctrine of clogging, subsequent to *Noakes & Co.* v. *Rice* (1), to which it is necessary to refer. In *Bradley* v. *Carritt* (2) Lord Macnaghten said that the Court of Appeal had proceeded upon the footing that the mortgagee of the tea shares had not retained any direct hold upon the shares, and added: "I do not think it is necessary that there should be any hold upon the property, direct or indirect. I think, as I ventured to say in *Noakes & Co.* v. *Rice* (3), that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption." And in *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (4) the same principle was applied where there was a loan on debenture stock with an option of purchase; the option was declared void and the mortgagor held entitled to redeem on payment of principal, interest, and costs.

In these circumstances, if I were to attempt to draw any narrow distinction between the present case and those to which I have referred, I should be evading or disregarding those authorities rather than following and applying the broad principles there laid down. In my opinion the agreement for the mining licence is invalid as offending against the maxim "Once a mortgage always a mortgage, and nothing but a mortgage," and as falling within the doctrine of a clog upon the equity of redemption. The result is that the plaintiff company is entitled to a declaration in accordance with paragraph 2 of the claim, but without costs, and that the counter-claim, which asks for substantive relief, must be dismissed with costs. The costs of taking evidence as to the foreign law will be treated in moieties, one as attributable to the action, and the other to the counter-claim.

Solicitors: *Hollams, Sons, Coward & Hawksley; Ingle, Holmes, Sons & Pott.*

(1) [1902] A. C. 24.
(2) [1903] A. C. 253, 261.
(3) [1902] A. C. 30.
(4) [1904] A. C. 323.

G. R. A.

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Jan. 13, 14.

[1909 P. 2009.]

Settled Land—Sale by Tenant for Life—Concurrence of Parties—Incumbrancers on Fee—Incumbrancers on Life Estate—Sale by Auction in Lots—Separate Transactions—Costs—Taxation—Duties of Trustees—Capital Money—Investment in Stock—Dividends declared but not paid—Right of Tenant for Life to Dividends—Solicitors Remuneration Act, 1881 (44 & 45 *Vict.* c. 44)—*General Order, August*, 1882, *r.* 6—*Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *ss.* 21, 22, 50, *sub-s.* 3 ; *s.* 53.

In giving a direction under s. 22, sub-s. 2, of the Settled Land Act, 1882, the tenant for life is bound to act as a trustee.

The rule laid down in *Cardigan* v. *Curzon-Howe*, (1889) 41 Ch. D. 375, that on a sale by a tenant for life under the Settled Land Act the costs of obtaining the consent and concurrence of the mortgagees on his life estate ought not, as a general rule, to be paid out of capital moneys, applies as well where the capital moneys are in the hands of trustees as where they are in Court.

Where a tenant for life, who has sold under the Settled Land Act, 1882, directs capital moneys in the hands of the trustees to be applied in payment of the costs, charges, and expenses of his solicitors in relation to the sale, the trustees are not bound to have such costs, charges, and expenses taxed, but are entitled to have an opportunity of considering their propriety, and if satisfied may without taxation pay them out of capital moneys.

The same rule applies to the payment out of capital moneys of the costs of procuring the concurrence in the sale of the incumbrancers on the fee.

Where property is offered by a tenant for life for sale in lots the tenant for life is vendor in respect of each contract of sale into which he eventually enters, and in such a case it is competent to the vendor's solicitor, who, before entering upon the business, has given the necessary notice under r. 6 of the General Order under the Solicitors Remuneration Act, 1881, of his intention to charge the ordinary detailed charges and not the scale fee in the case of sales under a certain amount, to treat the sale of each lot as a separate transaction, and to charge his costs accordingly.

Where upon a direction by a tenant for life trustees have invested capital moneys in their hands in the purchase of stocks on which at the date of purchase dividends have been earned and declared but not paid, the tenant for life is not entitled to such dividends.

Bulkeley v. *Stephens*, [1896] 2 Ch. 241 ; *Scholefield* v. *Redfern*, (1863) 2 Dr. & Sm. 173 ; and *Freman* v. *Whitbread*, (1865) L. R. 1 Eq. 266, distinguished.

ADJOURNED SUMMONS.

Under the compound settlement effected by the will of Sir

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Robert Peel, the first baronet, dated July 27, 1820, an indenture dated January 16, 1856, an indenture dated May 4, 1883, and an indenture of resettlement dated May 1, 1890, the present Sir Robert Peel was tenant for life and his son Robert Peel, an infant, tenant in tail in remainder of the estates thereby settled. The settled estates were subject to various charges and incumbrances having priority over the life estate, and the life estate had been both mortgaged and assigned by the tenant for life.

By an order dated May 12, 1904, and made in other proceedings, trustees were appointed, for the purposes of the Settled Land Acts, of the compound settlement.

From time to time portions of the settled estates had been sold by the tenant for life.

On July 14, 1906, a member of the firm of solicitors who acted for the tenant for life wrote to him with reference to a sale which was then in contemplation a letter in the following terms :—

"As I think you know in the case of these small sales, the scale charge does not properly remunerate us for the work which is involved and has to be done, and the costs are therefore made out in detail and charged according to Schedule II. of the Solicitors Remuneration Act, and if not paid by the purchasers these costs are submitted to the trustees of the compound settlement or the Solicitor to the Governors of Queen Anne's Bounty. I mention this now as you will not wish me to give notice to you on the occasion of every future sale that I propose to adopt the same course, and I shall be glad if you will therefore please treat this letter as notice that the costs relating to not only this sale but also to all sales under 1,000*l.* in value will be made out under Schedule II. of the Act."

To this arrangement the tenant for life agreed, reserving his right to tax the bills of costs if he thought fit to do so.

On November 25, 1908, a portion of the settled estates, consisting of freehold hereditaments situate in the parish of Oswaldtwistle, in the county of Lancaster, was put up for sale by auction by the tenant for life selling as tenant for life under the Settled Land Acts, 1882 to 1890. The portion so put up for sale was offered in twenty-six lots. Nineteen of these lots were sold, and the gross amount realized by the sale was 17,708*l.*

The mortgagees of the fee of the settled estates, the assignees of the life interest, and the trustees of the compound settlement respectively concurred in and were parties to the conveyances. The incumbrancers on the life estate of the tenant for life were not parties to the conveyances, but gave their consent to the sale by separate instruments.

Claims for payment of costs out of the moneys realized by the sale had been sent in to the trustees by (1.) the solicitors of the tenant for life; (2.) the respective solicitors of the several incumbrancers on the fee simple and inheritance; (3.) the respective solicitors of the assignees of and the several incumbrancers on the life estate of the tenant for life; and (4.) the solicitors of the trustees. The charges of the solicitors of the tenant for life as vendor were, in accordance with their arrangement with him, made out in detail according to the work done, and included in addition charges for work preliminary to the auction and generally in connection with the sale.

This was an originating summons taken out by the trustees (1.) for an order that they might be at liberty, out of the moneys in their hands arising from the sale, to allow or pay the costs of the tenant for life and the various incumbrancers; (2.) that all necessary directions might be given for ascertaining by taxation or otherwise the amount of such of the charges as were proper to be allowed; and (3.) that directions might be given as to the costs and charges which ought to be allowed to incumbrancers and others on future sales of the settled estates. The summons also asked for the determination of the question whether the tenant for life was entitled to certain dividends on stock purchased by the trustees which had been declared before, though not paid until after, the date of the purchase.

Both the applicants and the tenant for life submitted to have their costs taxed.

The question as to the costs was first argued.

Wurtzburg, for the summons. The first question is, What are the duties of trustees for the purposes of the Settled Land Acts where, in a case like the present, they have been directed by the tenant under s. 22, sub-s. 2, of the Settled Land Act,

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1882, to apply capital money in their hands arising from a sale of part of the settled land in payment of the costs of the tenant for life as vendor and the costs of the various incumbrancers on the fee and on the life estate? Their duty is, it is submitted, to investigate the bills of costs sent in, and, when satisfied with or without taxation as to the amount of the costs, charges, and expenses, to pay them out of the capital moneys in their hands. For this purpose they are entitled to have an opportunity of considering the propriety of the costs, charges, and expenses.

As regards the costs of obtaining the concurrence of the mortgagees of the life estate, the trustees ought not as a general rule to pay them out of capital money. The onus is on the tenant for life to shew that in the particular case they ought to be so paid: *Cardigan* v. *Curzon-Howe*. (1)

[WARRINGTON J. In that case the sale moneys were in Court. If they are not, then, according to the Act, they ought to be applied by the trustees in accordance with the direction of the tenant for life.]

The rule there laid down by Cotton L.J. (2) is a general rule, and is not confined to the case where the sale moneys are in Court.

E. J. Elgood, for the tenant for life. By s. 50, sub-s. 3, of the Act of 1882 the rights of an assignee for value of the estate of the tenant for life cannot be affected without his consent. The consent, therefore, of the assignees and mortgagees of the estate of the tenant for life in this case was necessary to the sale. That is clearly shewn by *In re Sebright's Settled Estates*. (3) I rely upon s. 22, sub-s. 2, of the Act, which provides that the investment or other application by the trustees of capital money shall be made according to the direction of the tenant for life, and one of the modes of application authorized by s. 21, is (sub-s. (x.)), in payment of costs, charges, and expenses of or incidental to the exercise of any of the powers of the Act. The tenant for life therefore had an absolute power to direct the trustees to apply the sale moneys in their hands in the payment of these costs,

(1) 41 Ch. D. 375.
(2) 41 Ch. D. 379.
(3) (1886) 33 Ch. D. 429.

charges, and expenses, and the trustees are not entitled to question his direction. It is only in clear cases of misconduct, like that in *In re Hunt's Settled Estates* (1), that the Court interferes with the tenant for life in the exercise of the power of direction given him by s. 22, sub-s. 2. Compare, for example, the order of the Court of Appeal in *In re Hotham* (2) with the order of Cozens-Hardy J. in the Court below. (3)

[WARRINGTON J. What do you say as to the costs of obtaining the consent and concurrence of the incumbrancers on the life estate?]

It is submitted that if a tenant for life acts in a reasonable manner in obtaining their consent and concurrence he ought to be allowed the costs of so doing.

Further, the solicitors of the tenant for life were entitled to treat the sale of each lot at the auction as a separate transaction and to charge their costs of such sale in accordance with their arrangement with the tenant for life, and that arrangement was not affected by the circumstance that the client was acting as a trustee: *In re Love.* (4)

John Henderson, for the infant tenant in tail in remainder. The costs of obtaining the concurrence of the mortgagees of the life estate cannot properly be charged against the estate. The tenant for life must pay the costs of obtaining the concurrence of his own mortgagees. *Cardigan* v. *Curzon-Howe* (5) is conclusive on the point.

[WARRINGTON J. referred to *In re Beck.* (6)]

Although there was a separate contract in respect of each lot sold at the auction, the sale was all one transaction. The solicitors of the tenant for life, therefore, were not entitled to divide the sale up into a series of transactions and to claim remuneration according to scale where the purchase-money of any lot exceeded 1,000*l.* and not according to scale where it did not. The business begins before the actual sale, and the solicitor must, under r. 6 of the General Order under the Solicitors Remuneration Act, 1881, elect before he enters upon the business.

(1) [1905] 2 Ch. 418.
(2) [1902] 2 Ch. 575, 578.
(3) [1901] 2 Ch. 790.
(4) (1889) 40 Ch. D. 637.
(5) 41 Ch. D. 375.
(6) (1883) 24 Ch. D. 608.

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WARRINGTON J. The question in this case is what the trustees for the purposes of the Settled Land Acts, who have received moneys arising from the sale of a part of the settled estates, ought to do in reference to claims for costs which have been made upon them by the tenant for life and by certain other persons. I may take it for the present purpose that the tenant for life has given the direction with regard to these costs required by s. 22, sub-s. 2, of the Settled Land Act, 1882, and the real question is whether the trustees are bound to comply with that direction and to pay all these costs, or whether they can in any and what way look into the propriety of the costs and refuse to pay such of them as they regard as improper.

Now in the first place it is necessary to ascertain what is the real meaning of the Act in this matter. Sect. 21 is the first section which is material, and it provides that capital money arising under the Act shall, when received, be invested or otherwise applied wholly in one or partly in one and partly in another or others of certain modes. Amongst the modes of application in which capital money may be applied is (sub-s. (x.)) in payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of the Act. Sect. 22 deals with the position of trustees who have received capital money which is so to be invested or applied, and it provides thus (sub-s. 1): "Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court," and if paid to the trustees—I am leaving out what is immaterial—shall be invested or applied by the trustees accordingly. Then comes sub-s. 2, which is a most important provision: "The investment or other application by the trustees"—now payment of costs, of course, is an investment or application—"shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees." I need not read the rest of the sub-section. Then s. 53 is as follows: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him,

be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." One of the powers which the tenant for life has under the Act is that of directing, amongst other things, the application of the purchase-money in the hands of the trustees in the payment of costs. Therefore, in giving that direction, the Act provides that he shall act as a trustee.

I now come to the real concrete question which I have to decide under this provision. The proceeds of sale have been received by the trustees of the compound settlement. The tenant for life has directed them to pay, first, a bill of costs of his own solicitors as solicitors for him as vendor; secondly, the costs of certain incumbrancers on the fee; and, thirdly, the costs of certain assignees and mortgagees of the life estate. With regard to the tenant for life's own costs, the costs of his own solicitors as vendor, there are two questions, one of general interest and one which is applicable to this particular case. The question of general interest is this: when a demand for payment of such costs is made on trustees for the purposes of the Settled Land Acts, what is their duty? In the first place, I think it is plain that they are entitled, if they so desire it, to have those costs taxed, because they are persons who, although not the parties chargeable under the bill, are liable to pay those costs by the very express provisions of the Act itself. Therefore I think they would be entitled to have the costs taxed under the Solicitors Act, as other persons are entitled who are liable to pay costs, though not the parties chargeable. Are they bound to insist on such taxation? I do not think they are. They are entitled to look into the bills, and if, either from experience which they have themselves or, being advised by competent persons as trustees should be advised if they have not the experience themselves, they come to the conclusion that the bills are reasonable in amount, I see no reason why they should be compelled to apply for an order for taxation; but I think they are plainly entitled to have an opportunity of seeing whether those bills are or are not fair in amount, and of considering whether they should require them to be submitted to taxation. In many cases it would be a reasonable course—and I think it

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would be a course which the trustees would be justified in taking—either to pay the amount of the bill if it was not a very large one, subject to repayment of the same on taxation if any part should be disallowed, or to make a substantial payment on account. I think the trustees would be perfectly justified in that course. I cannot, of course, give any abstract direction as to what the trustees should do in such a case; all I can say is that I think that would be a reasonable and proper course for trustees to take rather than to refuse to pay the whole of the bill.

Then there is the question of principle applicable to this particular case in reference to these costs of the vendor's own solicitors. This was a sale by auction in a number of different lots, and a considerable time before any business was done in reference to the sale of any of these lots the solicitors for the tenant for life had given him notice, stating it shortly, that on all sales for amounts less than 1000*l.* they would not act under the scale, but would make the ordinary detailed charges. Some of the lots were sold for sums less than the limit, and the vendor's solicitors have accordingly made their detailed charges. It is said on behalf of the infant tenant in tail that the sale cannot be divided up into these bits, so as to treat the sales of the separate lots as sales for the amount for which each lot was sold. I do not think that is so. When a solicitor acts as solicitor for a vendor where there is a sale by auction in a number of lots the vendor is vendor in relation to each of the contracts into which he eventually enters. That seems quite plain when one comes to look at the schedule to the order and the scale of remuneration. It regards the vendor as a vendor in relation to the particular contract which is then in question, and so it is, I think, here. The solicitors were entitled, before of course they entered on this particular business, to say that, as regarded such contracts as were under a certain amount, "We, as solicitors for the vendor, will not be bound by the scale, but as regards the other contracts for a larger amount we will be bound by the scale." It seems to me there is no objection in principle to the notice which the solicitors have given in reference to this matter, and that, therefore, the taxing Master — because the vendor's solicitors are willing to submit the matter to taxation—when he

looks into the matter, may quite properly deal with the smaller contracts by allowing the detailed charges so far as regards the charges to the vendor's own solicitors.

The next question which is raised is with regard to the charges made by solicitors for incumbrancers on the life estate whose concurrence in the sale was necessary. Are trustees bound to pay those costs? That matter was discussed in *Cardigan* v. *Curzon-Howe* (1) in reference to a case in which the purchase-money had been paid into Court, and the decision in that case was that, except under special circumstances, the costs paid by the tenant for life to mortgagees in respect of their concurrence ought not to be allowed. Cotton L.J. said this (2): "As a general rule, in my opinion, costs of obtaining, on a sale under the Act, the concurrence of mortgagees of the life estate, ought not to be allowed out of capital, and that will be a rule for trustees to act upon when the capital money is not in Court, and they have to deal with it." At first sight I thought that statement to some extent inconsistent with what appears to have been the decision, although there is no judgment on the matter, in *In re Hotham* (3), but it is not really so at all. When you come to consider it the question really resolves itself into this: In directing the payment of these costs, as in exercising any of the other powers of the Settled Land Acts, is the tenant for life doing his duty as a trustee? If the trustees of the settlement have information that the tenant for life is not doing his duty, as for example in *In re Hotham* (3), if they have information that the tenant for life is directing a mortgage when there has been no proper investigation of title, they are not bound to comply with his direction. So here in the matter of the payment of these costs, if the trustees are properly of opinion that in directing the payment of them the tenant for life is not doing his duty as a trustee, then they would be justified in refusing to pay them. When one looks at Cotton L.J.'s judgment, and the earlier part of it which precedes the passage I have read, I think the conclusion to draw from it is that the learned Lord Justice there was clearly of opinion that, where a tenant for life under

(1) 41 Ch. D. 375. (2) 41 Ch. D. 380.
(3) [1902] 2 Ch. 575.

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ordinary circumstances directs the payment out of capital of costs of obtaining the concurrence of mortgagees whose incumbrances he had himself created, the trustees ought not to comply with his direction. I think the learned Lord Justice there did mean to lay down a general rule, and a rule not merely applicable to cases in which the money was in Court, and that he meant to say that in such cases the tenant for life was not duly executing his duty as a trustee, and, as he was not duly executing his duty as a trustee, the trustees of the settlement were not bound to comply with his direction. So in this case it seems to me there are no special circumstances at all, and, if I were to allow the costs of concurrence of the incumbrancers here, in future cases under this very estate it might be a very serious charge indeed on the purchase-money realized by these sales. It seems to me, therefore, that, so far as that particular demand on the part of the tenant for life is concerned, I ought to direct the trustees that they ought not to pay the costs of the incumbrancers on the life estate.

There will therefore be an order for the taxation of the several bills. The costs of the mortgagees on the fee will, of course, be allowed out of the capital, and what I have said as to the duty of the trustees with regard to the costs of the tenant for life as vendor applies equally to these costs.

The question as to whether the tenant for life was entitled to the dividends which had been earned and declared, although not paid at the date of the purchase of the stock by the trustees, was then argued.

The facts as to these were as follows :—Several of the sales above referred to were completed between April 27 and May 28, 1909, and on May 27 the sum of 12,899*l.* was invested through the trustees' brokers for June 11, and as to the investments then made no question now arose. Between June 9 and July 9, 1909, further sales were completed, and the trustees then had in hand a sum of about 4000*l.* Correspondence having taken place with the solicitors of the tenant for life as to the investment of this money, they informed the solicitors of the trustees by letter dated July 22, 1909, that the tenant for life wished the money to be

invested in Great Northern Railway 3 per cent. preference stock and London, Brighton and South Coast Railway 5 per cent. consolidated preference stock. The trustees thereupon gave their consent, and their brokers on July 29 purchased 1150*l.* Great Northern Railway 3 per cent. preference stock and 1945*l.* London, Brighton and South Coast Railway 5 per cent. consolidated preference stock for August 12, the next account day on the Stock Exchange. This investment, by the usage and custom of the Stock Exchange, carried the dividends already declared for the half-year ending June 30, 1909, which were in due course collected from the sellers by the brokers on behalf of the trustees. The dividend received on the Great Northern Railway stock, amounting to 16*l.* 6*s.* 4*d.*, was declared on July 28, 1909, and paid on August 14, 1909. The dividend received on the London, Brighton and South Coast Railway stock, amounting to 45*l.* 19*s.* 8*d.*, was passed at a general meeting of the company on July 21 and paid on August 11, 1909.

Wurtzburg, for the trustees. The dividends having been declared before the date of the purchase of the stock, they were in fact paid for out of capital money. The question is one as between the tenant for life and the remainderman. There is no authority on the point where, as here, the entire dividends have been earned and declared though not paid before the date of the purchase of the stock.

E. J. Elgood, for the tenant for life. It is submitted that the tenant for life is entitled to these dividends. No doubt the amount of the purchase-money was increased by reason of the dividends which were about to become payable at the time when the stock was bought. But in such a case the Court will refuse to direct an apportionment as between the tenant for life and remainderman on the ground that "a grievous burthen would be imposed upon the estates of testators, by reason of the complex investigation which it would lead to": per Kindersley V.-C. in *Scholefield* v. *Redfern* (1); see also *Lord Londesborough* v. *Somerville* (2), *In re Clarke* (3), *Freman* v. *Whitbread* (4), and *Bulkeley*

(1) 2 Dr. & Sm. 173, 183.
(2) (1854) 19 Beav. 295.
(3) (1881) 18 Ch. D. 160.
(4) L. R. 1 Eq. 266.

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v. *Stephens* (1), in which latter case all the authorities on the point were reviewed.

John Henderson, for the infant tenant in tail in remainder. The authorities cited have no application to the present case. No question of apportionment here arises, because the whole of the dividends were earned antecedently to the date of the purchase. The purchase-money for the stock was increased by the amount of the dividends, and that amount of the increase was paid for out of capital. It has nothing to do with income. The tenant for life is therefore not entitled to these dividends.

WARRINGTON J. The question now raised is whether the tenant for life is entitled to receive certain dividends which have been paid in respect of moneys forming part of capital moneys arising under the Settled Land Act, 1882, and invested under the circumstances which I am about to state. In the early part of 1909 certain portions of the settled estates of Sir Robert Peel were sold. Some of those sales were completed and investments of the purchase-money made towards the end of May, 1909. As to those investments no question arises. The dividends on those investments for the year ending June 30, 1909, have in the ordinary course, I suppose, now been paid to the tenant for life, but in addition to those sales certain other sales took place at another period, with the result that in the early part of July the trustees had in their hands a sum of about 4000*l.* for investment. Pursuant to the direction of the tenant for life they invested that 4000*l.* partly in Great Northern Railway 3 per cent. preference stock and partly in London, Brighton and South Coast Railway 5 per cent. consolidated preference stock. By that time the half-year ending June 30, 1909, had expired, and consequently the whole of the dividends for that period had already been earned, but according to the practice of the two companies the dividends were not actually payable or paid until in the one case August 14, and in the other case August 11. The contract for the purchase of the stock was made on July 29. At that date both the dividends had been declared—that is to say, in the case of the Great Northern Railway the dividend had been formally declared, and in the case

(1) [1896] 2 Ch. 241.

of the London, Brighton and South Coast Railway no declaration of dividend was required, but the accounts shewing sufficient to pay the preference dividend had been passed on July 21. The dividends, therefore, at the date of the contract had not only been earned, but the amount had actually been ascertained, although the date for payment was postponed in the one case to August 14 and in the other case to August 11. By the usage of the Stock Exchange the purchase made under these circumstances carried with it the right to receive from the vendor the amount of the dividends which had been so earned though not actually paid, and the question now arises whether the tenant for life is entitled to those dividends.

Now there is here, of course, no question of apportionment. Treating the dividends as accruing de die in diem, the whole of the dividends had been earned and had accrued before the purchase in question. The tenant for life relies on the three cases of *Bulkeley* v. *Stephens* (1), *Scholefield* v. *Redfern* (2), and *Freman* v. *Whitbread*. (3) All those cases have to do with the purchase or sale, as the case may be, during a half-year, that is to say, during a dividend-earning period; and I think it appears from the judgment in *Scholefield* v. *Redfern* (2), which is referred to at some length by Stirling J. in *Bulkeley* v. *Stephens* (4), that the reason why the Court has in the case of a purchase under those circumstances declined to apportion the dividend as against the tenant for life, and has in the case of a sale declined to apportion the dividend in favour of the tenant for life, has always been the difficulty there is under such circumstances in arriving at the true sum—that is, at that part of the purchase-money—which is to be treated as representing the dividend for that purpose. In this case no such difficulty arises. The dividends had been earned at the time of this contract, and the real state of things is simple. For convenience the vendor is to receive the dividend so earned, but he has to pay it over again to the purchaser. The purchaser in fact pays to the vendor the amount of such dividend; the vendor holds that in his hands until he receives the dividend, and then he pays the dividend to the purchaser. In that case,

(1) [1896] 2 Ch. 241.
(2) 2 Dr. & Sm. 173.
(3) L. R. 1 Eq. 266.
(4) [1896] 2 Ch. 246.

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where the dividends, as here, have been entirely earned before the investment was made by the trustees, it seems to me that the dividends form part of the capital. The best way is not to say that the dividends form part of the capital, but to say that the tenant for life is not entitled to be paid by the trustees the amount of the dividends so received by the purchaser.

Solicitors: *Bircham & Co.; Dangerfield & Blythe; Braikenridge & Edwards.*

W. I. C.

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[1909 C. 2569.]

Administration—Annuity—Pecuniary Legacies—Deficiency of Assets—Valuation of Annuity—Right of Annuitant to Payment of Amount.

Testatrix by her will, after giving certain pecuniary legacies, bequeathed to her husband an annuity of one pound a week during his life, and directed her trustees to appropriate and set apart and invest such sum of money as would when invested produce by the income thereof an annual sum equal to the amount of the annuity and to apply the income or (if necessary) the corpus of the fund so appropriated in payment of the annuity, which sum should on the dropping of the annuity fall into and form part of her residuary trust estate. And she devised and bequeathed the residue of her real and personal estate to her trustees upon trust for sale and conversion and payment of her debts, funeral and testamentary expenses, and legacies, and to invest the moneys which should remain in certain investments, and to hold such investments upon certain trusts for the benefit of her son.

The estate of the testatrix was insufficient to pay the pecuniary legacies and to set apart a sum sufficient to answer the annuity to her husband in full. It was, however, sufficient to pay the pecuniary legacies and the value of the annuity as at the date of her death:—

Held, that the proper course for the trustees to adopt was to value the annuity as at the date of the death of the testatrix according to the Government scale and to pay the amount of such valuation to the annuitant or invest it in the purchase of an annuity, as he should choose, and to pay the pecuniary legacies in full.

Wright v. *Callender*, (1852) 2 D. M. & G. 652, applied.

ADJOURNED SUMMONS.

Harriet Jane Cottrell by her will, dated April 17, 1907, after appointing executors and trustees thereof and bequeathing

pecuniary legacies to an aggregate amount of 200*l.*, proceeded as follows: "I bequeath to my dear husband Charles Walter Cottrell an annuity of one pound a week during his life and I direct my trustees to appropriate and set apart and invest such sum of money as will when invested produce by the income thereof an annual sum equal to the amount of the said annuity and to apply the income or (if necessary) the corpus of the fund so appropriated in payment of the said annuity which sum shall on the dropping of the said annuity fall into and form part of my residuary trust estate." The testatrix then devised and bequeathed the residue of her real and personal estate to her trustees upon trust to sell and convert and pay her funeral and testamentary expenses, debts, and legacies, and to invest the trust moneys which should remain after such payments in the investments therein mentioned upon trust that if her son Frederick Walter William Hopper should be under the age of twenty-one years at her decease the trustees should apply the whole or such part as they should think fit of the income arising from such investments as aforesaid for or towards the maintenance and education of the said F. W. W. Hopper and should invest the surplus (if any) of the said income and all the resulting income thereof so as to accumulate at compound interest with power to resort to the accumulations of any preceding year or years and to apply the same to the maintenance and education of her said son, and upon further trust that if and when the said F. W. W. Hopper should attain the age of twenty-one years her trustees should pay over to him beneficially all her residuary trust estate together with the said accumulations or so much thereof as should not have been applied as aforesaid; but if the said F. W. W. Hopper should die under the age of twenty-one years, then her said trustees should stand possessed of the said residuary trust estate in trust for her sister Minnie Miles Bedingfield absolutely.

The testatrix died on February 26, 1909, and her will had been duly proved.

The whole of the estate of the testatrix had been realized and the trustees had in their hands the sum of 1250*l.* That sum was insufficient to pay the pecuniary legacies in full and

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enable a sufficient fund to be set aside and invested in trust securities to produce the annuity of 52*l.* directed to be paid to C. W. Cottrell, the husband of the testatrix. It was, however, sufficient to pay the pecuniary legacies in full and the value of the annuity as at the date of the death of the testatrix.

C. W. Cottrell was sixty-three years of age.

F. W. W. Hopper was seventeen years of age and was a son of the testatrix by her first marriage.

This was an originating summons taken out by the trustees asking for the determination (inter alia) of the questions (1.) in what manner the estate of the testatrix after payment of the funeral and testamentary expenses and debts ought to be apportioned by the trustees in respect of and amongst the said legacies and annuity, and (2.) whether and how the amount to be apportioned in respect of the said annuity ought to be invested by the trustees and in what manner such annuity and the investments representing the same and the income thereof ought to be applied (*a*) during the life of the said C. W. Cottrell and (*b*) after his death.

A. Whitaker, for the summons.

T. J. C. Tomlin, for the pecuniary legatees. The proper course in the present case is to value the annuity and to pay the amount of the valuation in full to the annuitant and the legacies in full to the legatees. If this is done both annuitant and legatees will be paid in full now. The difficulty I have in suggesting this course arises from the fact that the authorities seem to decide that where there is a direction in the will to set apart a sum to answer the annuity the amount of the valuation ought not to be paid over to the annuitant: *Wright* v. *Callender*. (1) That case, however, appears distinguishable from the present. There the question was how to adjust matters as between the annuitant and the residuary legatee, the annual income of the estate being insufficient but the corpus of the estate being ample to pay the annuity. The case, therefore, does not touch the present, where the real question is how to adjust matters as between pecuniary legatees and an annuitant, all of

(1) 2 D. M. & G. 652.

whom rank pari passu. In *Miner* v. *Baldwin* (1) an annuity was held to have been properly paid out of capital.

[WARRINGTON J. In that case apparently the whole fund had been exhausted. There was only an annuitant and the rights of pecuniary legatees did not come into question. Here the question is between the pecuniary legatees and the annuitant. If the annuitant receives the value of his annuity both legatees and annuitant can now be paid in full.]

That is my contention. If that course is not followed, and if on the contrary a rateable part of the fund required to answer the annuity is set aside and applied in paying the annuity, the pecuniary legatees run the risk of ultimately not getting paid in full at all, although the estate is in fact sufficient to pay them. If the annuity is valued now there will be no question of abatement, as there is sufficient estate to pay the pecuniary legatees in full and the annuitant the amount of the valuation of his annuity.

Owen Thompson, for F. W. W. Hopper, the residuary legatee. The residuary legatee will be very seriously prejudiced if a lump sum is taken out of the residue and paid to the annuitant, and it would be wrong in this case for the Court to direct such a payment having regard to the form of the gift of the annuity in the will. The annuitant is not entitled to payment of the amount of the valuation of his annuity out of the corpus. His right is to have a fund set aside to answer it. Where the estate is deficient and the question is one as between the annuitant and the residuary legatee the annuitant is not entitled to have his annuity valued and the amount of the valuation paid to him. If, however, the annuity is to be valued at all, it should be on the footing of the will, i.e., the sum to be set aside to produce 52*l.* per annum should be calculated and should abate rateably with the pecuniary legacies. Where an annuity is charged on corpus the annuitant is not entitled to be paid the value of his annuity: *In re Grant.* (2)

Gratrix v. *Chambers* (3), in which it was held that the annuitant was entitled to have the accruing payments of the annuity

(1) (1858) 1 Sm. & Giff. 522. (2) (1883) 52 L. J. (Ch.) 552.
(3) (1860) 2 Giff. 321.

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made good, if necessary, out of capital, was distinguished by Kekewich J. in *In re Sinclair* (1) on the ground that the annuity there was charged on corpus. The cases are all collected in Theobald on Wills, 7th ed. p. 502, but in none of them was there, as here, a direction to set aside a fund to answer the annuity. Where the Court has to consider the question as between an annuitant, pecuniary legatees, and a residuary legatee it will deal with the matter in such a way as not to raise and pay a sum out of the residue. The jurisdiction to raise and pay is only exercised by the Court where it is administering the estate: *In re Nicholson's Estate.* (2)

H. W. Malkin, for the annuitant. The proper course is, it is submitted, to value the annuity and to pay the income of the valuation to the annuitant, making good any deficiency in the income out of capital.

[WARRINGTON J. That might operate very unfairly on the pecuniary legatees.]

WARRINGTON J. The question in this case is what is the proper course to adopt in order rightly to satisfy the demands of certain pecuniary legatees and an annuitant in a case in which the amount of the estate of the testatrix is not sufficient to give effect literatim to the directions of her will, but is sufficient if the amount of the annuity is to be treated as a legacy and dealt with accordingly, in which case the estate would be sufficient to pay both the legatees and the annuitant in full. Now the facts are these: [His Lordship read the material parts of the will above set forth, and continued:—] Now the amount of the estate of the testatrix is sufficient to pay in full the pecuniary legacies and the value as at the date of the testatrix's death of the annuity of 52*l.* It is not sufficient to pay the pecuniary legacies in full and to set apart in full a fund sufficient by the income thereof to pay the annuity. If, therefore, the directions of the testatrix are to be carried into effect in the form in which they are expressed in the will the pecuniary legacies and the amount to be set aside to answer the annuity will have to abate. It is true that if the annuity did not in the

(1) [1897] 1 Ch. 921, 926. (2) (1876) Ir. R. 11 Eq. 177.

result exhaust the abated fund set aside the pecuniary legatees might in the end get paid in full—they might or they might not. Under those circumstances what is the course which the Court ought to pursue? In the ordinary case where there is a gift of an annuity to an annuitant with a direction to set aside a fund to answer the annuity, and the annuity is payable out of capital as well as income and there is a gift over of the residue, it was decided in *Wright* v. *Callender* (1), and I think it is the law, that the right of the annuitant is to have the directions of the testator carried into effect, and that if the estate is not sufficient to pay the annuity in full he is entitled to have the deficiency made up out of capital, but he must take the estate as it stands and is not entitled to have the value of the annuity paid over to him. That is the law where the question is one simply as between an annuitant and residuary legatees. But where the question is one as between an annuitant and pecuniary legatees, and the estate is insufficient for the payment of the annuity and the pecuniary legacies, then, where there is a direction in the will to set apart and invest a sufficient sum to answer the annuity, the course adopted by the Court has been to value the annuity as at the date of the testator's death, to treat the amount of the valuation as a legacy, and to make it abate in its due proportion, and then to pay the abated amount to the annuitant. In each of those two cases respectively those are the proper courses to pursue, as is shewn by *Wright* v. *Callender*. (1) But the case with which I have to deal is the intermediate case. It is this: If the course is to be pursued in the present case which is pursued in the case where the estate is insufficient to pay both the pecuniary legatees and an annuitant in full, the pecuniary legacies will be paid in full and the annuitant will receive the full value of his annuity at once. If, however, I take the amount directed to be set aside to answer the annuity and treat it as a legacy and make it abate with the other pecuniary legacies, then three courses are possible; either (1.) the annuitant is to receive the income of the abated fund, or (2.) he is to receive his annuity in full out of both income and capital, or (3.) by some intricate calculation he is to receive

(1) 2 D. M. & G. 652.

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out of income supplemented by capital a yearly sum abated in proportion to the actual abatement of the pecuniary legacies. Whichever of those three courses be adopted, an injustice will be done to the pecuniary legatees, which would be avoided by adopting the course which is contended for on behalf of the pecuniary legatees. The right of the pecuniary legatees is to be paid at the expiration of one year from the testator's death, that is, in the present case, at once, the amounts of their legacies. If I adopt the course pressed upon me by counsel for the residuary legatee I do not pay the pecuniary legatees the amounts of their legacies in full. The annuitant may get paid in full, the pecuniary legatees may or may not be paid in full, at some time hereafter, when it is known how long the annuitant has lived, and possibly if both the annuitant and the pecuniary legatees are paid in full there may be something left for the residuary legatee. But that course is wholly speculative. By adopting the other course I can do justice at once without any speculating to both the pecuniary legatees and the residuary legatee. The pecuniary legatees are entitled to be paid in full at once; so also is the annuitant. It is true that here the testatrix has provided a means by which the annuity can be secured, but to follow that course would be to do injustice to the pecuniary legatees. In my judgment justice can be done to all the three classes of beneficiaries by adopting the course suggested by counsel on behalf of the pecuniary legatees, namely, by valuing the annuity as at the date of the death of the testatrix according to the Government tables or according to ordinary actuarial principles and treating the amount of the valuation as a pecuniary legacy, and paying the pecuniary legatees in full and the annuitant the amount of the valuation of his annuity, if he is willing to accept it, or investing it in the purchase of a Government annuity of 52*l*. There will thus remain a residue to which the residuary legatee will be entitled.

It seems to me that there are no authorities which are of any assistance to me, except *Wright* v. *Callender* (1) and *Wroughton* v. *Colquhoun* (2), the latter of which lays down the rule applicable

(1) 2 D. M. & G. 652.

(2) (1847) 1 De G. & Sm. 357.

in the case of insolvent estates. I think that rule first appeared in *Wright* v. *Callender*. (1) The other cases which have been referred to do not help in this case. In *In re Grant* (2) the question was not as between annuitant and legatee or as between annuitant, pecuniary legatee, and residuary legatee, but as between tenant for life and remainderman. The decision was on an entirely different point from that in the present case and does not therefore help me. In *In re Sinclair* (3) the annuitant was a creditor and the annuity was subject to a provision for forfeiture on alienation, and that was the point in the case. Kekewich J. was of opinion that, it being the case of a creditor, the annuity ought to be valued, and, it being possible that the additional element of forfeiture might affect the value, it must be taken into account in valuing the annuity, and that the amount must be paid to the creditor.

I think the course I have indicated is the proper one, namely, to declare that the annuity ought to be valued as at the death of the testatrix according to the Government scale and the amount of such valuation paid to the annuitant or invested in the purchase of an annuity, as he shall choose, and the pecuniary legacies paid in full.

Solicitors: *Peacock & Goddard, for F. G. Lefroy, Bournemouth; Pritchard, Englefield & Co.*

(1) 2 D. M. & G. 652. (2) 52 L. J. (Ch.) 552.
(3) [1897] 1 Ch. 921.

W. I. C.

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Feb. 19.

COOKSON *v.* CATTON.

[1909 C. 308.]

Practice — Costs — Taxation — Motion — Speedy Trial — Motion heard with Witnesses and treated as Trial—Counsel's Fees—Rules of the Supreme Court, Order LXV., r. 27, sub-r. 47.

The plaintiff moved in an action for an interim injunction and the Court directed that the motion should be heard with witnesses and treated as the trial of the action. The plaintiff's solicitors delivered fresh briefs to counsel as for the trial of the action. On February 24, 1909, at the hearing the case was compromised on terms which included a stipulation that one of the defendants should pay the plaintiff's costs. The judgment, which embodied the terms of the compromise, commenced as follows: "Upon motion on the 5th and 12th February 1909 and this day made unto the Court by counsel for the plaintiff which motion was on the 12th February 1909 ordered to be set down for hearing on the 18th February 1909 as a motion with witnesses, to be treated as the trial of the action, and upon reading," &c. The taxing Master allowed the fees marked on the briefs delivered on the motion, but disallowed half the fees marked on the fresh briefs of counsel for the plaintiff, and the plaintiff took out this summons to vary his certificate:—

Held that, inasmuch as the motion was not disposed of till the hearing on February 24, the taxing Master was right.

SUMMONS to vary the taxing Master's certificate. An action was commenced on January 30, 1909, for, amongst other relief, an injunction with reference to certain shares in a limited company, and on February 5 the plaintiff moved before Parker J. for an interim injunction in the terms of the writ. The motion stood over till February 12, when it appeared that the case involved a conflict of fact which it would be inconvenient to determine on affidavit evidence, and accordingly directions were given that, upon the defendants giving an undertaking in the meantime, the motion should be in the list for trial on February 18 to be heard with witnesses, and both parties agreed to the hearing being treated as the trial of the action. The action was set down for trial with witnesses and the fee of 2*l.* payable on entering an action for trial was paid by the plaintiff. Discovery was given by each side, and the case came on for hearing on February 18 and stood over till the 24th. The plaintiff's

solicitors prepared proofs of the witnesses and delivered fresh briefs to counsel as on the trial of the action, the leader's brief being marked twenty guineas and the junior's fifteen guineas. The briefs on the motion for an interim injunction had been marked ten guineas and seven guineas respectively. On February 24, after a partial hearing, the case was compromised, one of the terms of settlement being that the defendant Catton should pay the plaintiff his taxed costs of action. The judgment, which embodied the terms of the compromise, commenced as follows: "Wednesday the 24th day of February 1909 Between Freville Cookson plaintiff and J. M. Catton and the Vagliano Anthracite Collieries Limited defendants. Upon motion on the 5th and 12th February 1909 and this day made unto this Court by counsel for the plaintiff which motion was on the 12th February 1909 ordered to be set down for hearing on the 18th February 1909 as a motion with witnesses, to be treated as the trial of the action, and upon reading," &c. The taxing Master reduced the fee on leading counsel's brief at the trial from 21*l.* 15*s.* (with brief and clerk) to 11*l.*, and the fee on junior counsel's brief from 16*l.* 15*s.* to 7*l.* 10*s.* The plaintiff delivered particulars of objections to the disallowance of these sums, and the taxing Master replied as follows: "In this case I think the true view is that, as the motion was not disposed of, the fees paid were not worked out, and that the proper course to have adopted was that taken by the defendants' solicitors in marking a further (as distinguished from a fresh) fee on the brief. The fee I have allowed on this basis is in my opinion a fair one and proper and I do not see my way to increase it."

J. W. Manning, for the summons. The plaintiff's solicitors were entitled to deliver fresh briefs for the hearing of the motion in the same way as on the trial of the action. It was directed to come on with witnesses and to be treated as the trial, and, whatever may have been the exact meaning of the direction, it was the trial of the action. We paid the usual fee for setting the action down for trial, and the effect of the direction was to make the order made at the hearing a final order. The circumstance that that order purports to be made on the motion is immaterial.

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The taxing Master has allowed a fee as with further papers, but that is insufficient. Counsel's fees are in a similar position to solicitors' fees, and where a special motion is treated as the trial of the action solicitors are allowed fees as on the trial under Rules of the Supreme Court, 1883, Appendix N, item 172, instead of fees on a motion under item 166: *Dyer* v. *London School Board.* (1)

H. E. Wright, for the respondent. That case has no bearing on this application. Solicitors and counsel are remunerated on different footings. Solicitors are paid for attendances by the day and counsel are not. Counsel do not receive fresh fees if a case stands over; nor are they entitled to further fees if a motion is disposed of on motion day in the ordinary way and is treated as the trial of the action. The question here is whether the briefs on the motion had been worked out; whether the motion had been disposed of. It is clear that it was not disposed of till February 24.

J. W. Manning in reply.

WARRINGTON J. stated the facts, and continued:—What is the principle upon which briefs are delivered and fees paid to counsel? It is this: that the parties are entitled as against each other to deliver a separate brief on each separate proceeding, but that until any proceeding has been disposed of the brief originally delivered is the only one which the parties are entitled to deliver or counsel are entitled to ask for. So the question is really whether this hearing on February 24 was a disposal of a separate proceeding in the action or the disposal of the motion. It is quite plain on the form of the order that the motion was not disposed of till February 24, and that what was then disposed of was the motion. I think, therefore, that the proceeding on which the order was made was the motion, and that the plaintiff's solicitors were not entitled to deliver fresh briefs as on a fresh proceeding, but that they were entitled to pay and counsel were entitled to demand no more than such fees as the taxing Master might think fit to allow on the motion, having regard to the circumstances in which it was dealt with. The taxing Master

(1) [1903] W. N. 83.

has considered that point, and in my opinion he is right and the plaintiff's objections are not well founded. The plaintiff has cited and relied on *Dyer* v. *London School Board* (1), a case with reference to solicitors' charges; but that decision in no way governs the present case, for the remuneration to which solicitors are entitled is ascertained on an entirely different footing from that on which counsel's fees are fixed. It is true that as the motion was to be treated as the trial of the action it became of much greater importance than when it was only an interlocutory application; but that is met by the observation that it was open to the parties to pay and to the taxing Master to allow higher fees than would be justified on an ordinary motion. The Master has dealt with that; he has allowed an increased fee and he says that the fees he has allowed are sufficient. In my opinion he was right and the application must be dismissed with costs.

Solicitors: *Blair & W. B. Girling; Ashurst, Morris, Crisp & Co.*

(1) [1903] W. N. 83.

H. C. R.

NEVILLE J.
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Jan. 12, 18, 19.

In re AUSTRALIAN ESTATES AND MORTGAGE COMPANY, LIMITED.

[00445 of 1909.]

Company—Reduction of Capital—Memorandum—Articles—Reorganization of Capital—Consolidating different Classes of Stocks and Shares into one Stock—Validity of Resolutions—Companies (Consolidation) Act, 1908 (8 *Edw.* 7 c. 69), *ss.* 7, 45, 48, 69; *Table A, art.* 4—"*and Reduced*" *dispensed with.*

By the memorandum of a limited company formed in 1894 under the Companies Acts the capital of the company was 1,000,000*l.* divided into 100,000 ordinary shares of 10*l.* each, and the capital was afterwards increased by special resolution in the statutory mode. The company's articles of association authorized the company to issue its share capital with such preferences or special rights as they thought fit, and provided (article 12) that all shares should be held on the terms that any rights or preference or special privilege of the holders of any class of shares should not be interfered with except by a special resolution passed and confirmed by shareholders of that class, and every resolution so passed should be a valid resolution binding all shareholders of such class; and (article 14) that the company might by special resolution reduce its capital.

In 1903 the company divided its existing share capital into preference shares and stocks and ordinary stocks by special resolution, which resolution became part of the memorandum. In 1909 the company, having lost capital to a large amount, passed in general meeting, held under s. 69 of the Companies (Consolidation) Act, 1908, a special resolution reducing its capital by writing off the loss in certain proportions from the nominal amount of its then issued preference shares and stock and ordinary stock, and at the same time passed a second special resolution that upon the reduction of capital being sanctioned by the Court the preference rights attaching to the preference shares and stock should be extinguished, and that the preference stock and ordinary stock resulting from the reduction of capital should forthwith thereafter be consolidated into one consolidated ordinary stock ranking pari passu for all purposes. Those two resolutions were at the same time also passed at separate meetings of each class of preference share and stock holders and ordinary stock holders held under article 12. The company then presented a petition for the sanction of the Court to the resolution reducing its capital. Dissentient stockholders opposed on the ground that the second resolution came within s. 45 of the Act and was ultra vires as it had not been passed in conformity with that section.

The Court sanctioned the reduction, holding that the resolutions

had been validly passed under the articles and that s. 45 did not apply.

The words "and reduced" were dispensed with as they would be injurious to the company in Australia.

PETITION.

The Australian Estates and Mortgage Company, Limited, was incorporated in 1894 under the Companies Acts, 1862 to 1890, with memorandum and articles of association. Its principal object was to acquire the undertaking and assets of a mortgage and agency company in Australia and to carry on a similar business. The 5th clause of the memorandum was: "The capital of the company is 1,000,000*l.* divided into 100,000 shares of 10*l.* each. The shares in the original capital and any new shares may be divided into different classes and may be issued with any special rights, preferences, conditions, or qualifications as regards dividends, capital, voting or otherwise, attached thereto."

The articles of association so far as material were:—

"10. The share capital of the company (including forfeited or surrendered shares) may . . . . be issued by the board to such persons, at such times and on such terms, whether as to premium or otherwise, with such preferences or special rights, and for such purposes of the company as they see fit."

11. empowered the company in general meeting by resolution to increase the capital by the creation of new shares.

"12. All shares shall be held on the terms that any rights or preference or special privilege of the holders of any class of shares shall not be interfered with except by a special resolution passed and confirmed by shareholders of that class, independently of the presence or votes of any shareholders of any other class, and every resolution so passed shall be a valid special resolution binding all shareholders of such class."

"14. The company may at any time, by special resolution, reduce the capital, convert shares into stock, or consolidate and divide the capital or any part thereof into shares of larger or less amount than the original shares in the manner and with the incidents prescribed by the Companies Acts."

In July, 1896, the company, by special resolution passed in the statutory mode, increased its capital to 1,250,000*l.* by the creation

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of 25,000 shares of 10*l.* each, such new shares to rank as ordinary shares pari passu with the existing capital of 1,000,000*l.*

In 1903, by special resolutions of the company passed in statutory mode, each of the 125,000 ordinary shares of 10*l.* each was sub-divided into two shares, one of 5*l.* 15*s.* and the other of 4*l.* 5*s.*, each fully paid up; each of the shares of 5*l.* 15*s.* being called a preference share and being entitled to a non-cumulative preferential dividend of 5*l.* per cent. and to priority in repayment of capital. Each of the 5*l.* 15*s.* preference shares was further sub-divided into a preference share of 3*l.* and a preference share of 2*l.* 15*s.* fully paid up, and certain of these sub-divided shares were converted into preference stock. The capital of the company was further increased by the creation of 75,386 shares, some of which with certain other shares were consolidated into preference shares of 6*l.* each with the same preferential rights, and all the ordinary shares of 4*l.* 5*s.* each, with certain of the sub-divided preference shares, were consolidated into ordinary stock.

At the date of the resolutions after stated the capital of the company stood at 1,495,004*l.* 10*s.*, of which capital to the nominal amount of 1,486,746*l.* 5*s.* had been issued, consisting of 511,040*l.* 5*s.* preference stock, 72,845 preference shares of 6*l.* each, on each of which 2*l.* 15*s.* was paid up, and 538,636*l.* ordinary stock. The preference shares and stock ranked pari passu and were entitled to a non-cumulative preference dividend at the rate of 5 per cent. per annum and also to priority in capital.

By special resolutions duly passed and confirmed in accordance with s. 69 of the Companies (Consolidation) Act, 1908, at extraordinary general meetings of the company held respectively on November 29 and December 15, 1909, it was resolved as follows, namely:—

"1. That the capital of the company should be reduced to 649,661*l.* 11*s.*, consisting of 306,624*l.* 3*s.* 5 per cent. preference stock, 72,845 5 per cent. preference shares of 3*l.* 12*s.* each, on each of which the sum of 7*s.* per share should be treated as paid up, and 80,795*l.* 8*s.* ordinary stock, and that such reduction should be effected by writing off capital which had not been issued to the extent of 8285*l.* 5*s.* and capital which had been

lost or was unrepresented by available assets to the amount of 837,084*l.* 14*s.*, namely, as to 204,416*l.* 2*s.* off the 5 per cent. preference stock, as to 174,828*l.* off the capital paid up on the 5 per cent. preference shares, and as to 457,840*l.* 12*s.* off the ordinary stock.

"2. That upon the said reduction of capital being sanctioned by the Court the preferential rights attaching to the preference stock and preference shares be extinguished, and that forthwith thereafter the 306,624*l.* 3*s.* and 80,795*l.* 8*s.* stock resulting from the above reduction of capital be consolidated into one consolidated ordinary stock ranking pari passu for all purposes with the 72,845 shares of 3*l.* 12*s.* each, and that as and when the said shares of 3*l.* 12*s.* each are from time to time paid up in full the shares so paid up be consolidated with the said consolidated ordinary stock."

By special resolutions of the separate classes of preference stock and share holders and ordinary stock holders passed at separate class meetings held under article 12 on November 29 and December 25, 1909, the same resolutions were passed and confirmed.

The company then presented a petition asking that the reduction of the capital to be effected by the first resolution of November 29 might be sanctioned by the Court. After the presentation of the petition some dissentient ordinary stock holders wrote the company pointing out that the sanction of the Court was not asked for to the extinguishment of rights and reorganization of capital contemplated by the second resolution of November 29, and objecting that that resolution had not been passed in conformity with s. 45 of the Companies (Consolidation) Act, 1908 (1), and was ultra vires, and therefore

(1) Companies (Consolidation) Act, 1908, s. 45 :—

"(1.) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes:

"Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share

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they should not appear to oppose the petition. On the petition coming on for hearing the Court directed it to stand over in order that the objecting stockholders should appear and be heard on the point they had raised.

Jan. 18. The petition now came on again. It was admitted that the resolutions had not been passed by the requisite majorities under s. 45 of the Act, if that were necessary.

Younger, K.C., and *Whinney*, for the petition. This scheme proposes to alter the position of the preference shares and stock as part of the reduction of capital. The only legal point is whether the scheme must be approved in the special manner required by s. 45 of the Companies (Consolidation) Act, 1908, or whether it is sufficient that it should be passed by special resolutions at separate meetings of each class of shareholders. Having regard to article 12, under which the resolutions were passed, it is not necessary that they should also have been passed under s. 45. That section was first enacted by the Companies Act, 1907, and it provides that a company may by special resolution confirmed by the Court "modify the conditions in its memorandum" in certain ways, of which "the consolidation of shares of different classes," as proposed here, is one. Then follows a proviso that "no preference or special privilege attached to any class of shares shall be interfered with except" by a resolution passed as therein provided. The whole section is directed only to cases in which it is necessary to alter the memorandum of association, and the proviso only applies to the preceding clause in the section. The Companies Acts never required the privileges of preference shares to be stated in the memorandum, though it was often done. In this case the

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capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class.

"(2.) Where an order is made under this section an office copy thereof shall be filed with the registrar of companies within seven days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed."

preference shares and stocks were created by special resolution in 1903 after the formation of the company, and not by the memorandum. It was decided in *Ashbury* v. *Watson* (1) that though it was not necessary that the rights of preference shareholders should be inserted in the memorandum, if they were so inserted they were unalterable, the only exception being that where the company could reduce capital they could throw the loss anywhere, and so incidentally could alter the rights of different classes of shareholders.

[NEVILLE J. What is the meaning of the 5th clause in the memorandum empowering the company to issue preference shares ?]

It was no doubt inserted because before the decision of *Andrews* v. *Gas Meter Co.* (2) the opinion prevailed that a company could not create a special class of preference shares unless power to do so was contained in the memorandum. Preference shareholders' rights inserted in the memorandum were unalterable with the qualification, established by *In re Welsbach Incandescent Gas Light Co.* (3), that if the memorandum specially provided for alteration it could be made by altering articles. But any rights created by the original articles or by articles introduced or varied by special resolution could always be altered by special resolution varying the articles: *Allen* v. *Gold Reefs of West Africa.* (4)

There was at one time an impression that the voting powers attached to shares could not be so altered, but that was swept away by *In re James Colmer, Ld.* (5), and it was definitely established that any article might be altered by special resolution. *British and American Trustee and Finance Corporation* v. *Couper* (6) shews that alteration of the rights of different classes of shareholders may be effected as part of a scheme for reduction of capital. That was the state of the law and practice when s. 45 of this Act was passed. It is impossible to suppose that that section was intended to alter all this. It is in terms confined to

(1) (1884) 28 Ch. D. 56; (1885) 30 Ch. D. 376.
(2) [1897] 1 Ch. 361.
(3) [1904] 1 Ch. 87.
(4) [1900] 1 Ch. 656.
(5) [1897] 1 Ch. 524.
(6) [1894] A. C. 399.

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alterations in the memorandum of association, and it cannot take away any existing powers which could be exercised without altering the memorandum. Table A, art. 4, clearly shews that no such alteration was intended, for it gives a power to vary the rights of any class of shares by special resolution of a meeting of the holders of such shares, and Table A may be looked at as shewing the views of the Legislature with regard to matters therein mentioned: Buckley on Companies, 9th ed. p. 21, citing *In re Pyle Works.* (1) *In re Hyderabad (Deccan) Co.* (2) exactly covers this case if, as we contend, the law has not been altered by s. 45. Lastly, we have ample evidence that the capital proposed to be written off is lost, though that is not now necessary: *Poole* v. *National Bank of China* (3); *In re Louisiana and Southern States Real Estate and Mortgage Co.* (4)

A. Adams, for the opposing shareholders. Since the passing of the Act of 1908, which is a consolidation Act, the rights of members are governed by that Act alone, and it must be read by itself as a whole, and effect must be given to it although it may take away a right which certainly would have existed under previous Acts if they had remained unrepealed. The Act, after stating what the memorandum of association, which is the charter of the company, must contain, provides (s. 7) that a company may not alter the conditions contained in its memorandum except as provided in the Act. Then follow a number of sections which authorize the company's altering these conditions in different ways. In some cases power is given to alter them if the company is so authorized by its articles of association, as in ss. 34, 37, 39, 41. But then comes s. 45, which empowers a company to reorganize its share capital and provides for the alteration of the rights of different classes of shareholders, and this section requires a special resolution passed by specified majorities. It is much the strongest of all these sections, and it is submitted that it is impossible to contend that the rights of different classes of shareholders can be altered in any other way. Then s. 61 empowers a company to alter its memorandum, and s. 286, the repealing section, which specially preserves certain

(1) (1890) 44 Ch. D. 534, 571, 586.
(2) (1896) 75 L. T. 23.
(3) [1907] A. C. 229, 239.
(4) [1909] 2 Ch. 552.

rights, clearly does not preserve any right such as is claimed in this case. It is submitted, therefore, that the present Act now contains the law within its four corners, and that the Legislature intended by s. 45 that the particular powers therein mentioned should not be exercised or be exercisable except in the manner specified in the section. Lord Herschell's judgment in *Bank of England* v. *Vagliano Brothers* (1) shews that where an Act is passed codifying the law the old law cannot be used to vary its construction; and *Thomas* v. *United Butter Companies of France* (2) also supports this view. In this case the memorandum of association gave power to issue preference shares, but gave no power to vary them. Even if it were governed by the old law it would come within the cases where the rights of the preference shares were defined by the memorandum and are unalterable except to the extent and manner prescribed by s. 45. Further, every modification of a memorandum which is authorized by statute is one of the necessary conditions of the memorandum and itself becomes part of the memorandum. So that, when one is dealing with the word "memorandum" in s. 45, it does not simply connote the printed document which was originally issued when the company was incorporated, but it also connotes every valid alteration and modification which has since been made in that memorandum under due statutory powers, and ss. 9, 41, 45, and 52 support this view. Therefore the word "memorandum" in s. 45 is the original memorandum plus authorized additions and alterations. In the present case the memorandum is the original document plus the resolutions of 1903 turning the shares into preference and ordinary and sub-dividing them. That being so, the company propose, first of all, with the sanction of the Court, to reduce the nominal amount of the shares and stocks of different classes, which still remain different classes—that is not objected to; but then by the second resolution without the sanction of the Court they propose to consolidate those reduced shares and stocks of different classes into one ordinary stock, and this consolidation is not to take effect until the Court sanctions the first resolution. It is submitted that that is ultra vires, unless it is done by the mode pointed out by s. 45: *Holmes'*

(1) [1891] A. C. 107, 144. (2) [1909] 2 Ch. 484.

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Case. (1) Again, the Court only sanctions the reduction, and then under ss. 51 and 52 of the Act the minute when registered becomes part of the memorandum, and therefore the second resolution consolidating can only operate on shares and stocks of different classes, the division of which is part of the memorandum; and that can only be done as allowed by the Act. Therefore the cases cited do not apply. They only refer to matters which need not be dealt with by the memorandum at all, and Table A, clause 4, is not inconsistent with our contention. It does not mention the question of consolidation or sub-division of shares. It merely relates to such things as preferential rights of dividend, voting, and such like matters.

No reply was called for.

NEVILLE J. In this case when the petition for the confirmation of the reduction of the capital was first brought before me it appeared to me upon the evidence to be desirable that there should be a reduction and that the terms of the reduction proposed were fair. A very large majority of the shareholders who have expressed directly or indirectly any opinion upon the matter were in favour of the scheme, but I was told that certain ordinary stockholders, who were not before me, took up this position—that they did not oppose the confirmation of the reduction by the Court, but they intimated that the terms upon which the reduction was assented to by the shareholders involved ultra vires resolutions on the part of the company, and they proposed to reserve their rights in that respect. The result of which would have been that, had their contention eventually proved to be sustainable, the intentions of the shareholders would have been entirely defeated, and a very serious state of things between the different classes of stock and share holders would have arisen had the Court sanctioned the reduction and thereby rendered it valid. Therefore I directed the petition to be adjourned in order that the objecting shareholders should be represented, and they have now come before me and argued very fully their point with regard to the validity of the second resolution, and I have now to consider whether the terms upon which the reduction

(1) (1867) L. R. 2 Ch. 714.

was consented to were valid or invalid, because, if I thought they were invalid, I should not sanction the reduction.

The terms of the reduction, speaking generally, were these. At the time in question the capital of the company was divided into preferential stock, preferential shares, and ordinary stock, and the preferential stock and share holders had the right to a fixed non-cumulative dividend and to priority in respect of capital, the ordinary shareholders taking the balance of the profits of the company amongst themselves, and ranking after the preferential stock and share holders with regard to capital. Now it is proposed to reduce the ordinary stock by 85 per cent. and the preference stock and shares by slightly over 40 per cent. The result of that, of course, would be to reduce the nominal amount of the stocks and shares. This reduction was upon certain terms which appear in the second resolution passed at the meeting, which, upon the face of it, is made dependent on the reduction of capital receiving the sanction of the Court, and it is to this effect: "That upon the said reduction of capital being sanctioned by the Court the preferential rights attaching to the preference stock and the preference shares be extinguished, and that forthwith thereafter the 306,624*l.* 3*s.* and 80,795*l.* 8*s.* stock resulting from the above reduction of capital be consolidated into one consolidated ordinary stock ranking pari passu for all purposes with the 72,845 shares of 3*l.* 12*s.* each, and that as and when the said shares of 3*l.* 12*s.* each are from time to time paid up in full the shares so paid up be consolidated with the said consolidated ordinary stock." So that by this resolution, which is made in terms dependent upon the sanction of the reduction scheme, something is done, no doubt, which involves an alteration of the memorandum, that is, shares are converted into stock. Then it is said that there is a sub-division of shares. That is an argument that I have not been able to follow. It seems to me that such alteration as there is in the amount of the shares is dependent not upon this conditional resolution, but upon the reduction of the capital provided for in the previous resolution. It seems to me that what is done by the second resolution, beyond the conversion into stock to which I have already referred, is the alteration of the preferential rights of the

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different owners of capital inter se, and therefore I have to consider whether that can be done without recourse to s. 45 of the Act of 1908. Now this company had a capital the amount of which and the number of shares into which it was divided was stated in the memorandum of association; but as I read the memorandum and the subsequent resolution of 1903 the preferential rights of the owners of the capital inter se were not regulated by the original memorandum, but were regulated by a special resolution which would have the effect of an original article. I think that so far as the preference between the shareholders depends upon their rights under the articles and not under the memorandum, those rights can be modified in the same way that the articles themselves can be modified, and that such modification does not involve an alteration in the memorandum itself. I ought to say that, in the memorandum before me, I think that the operative and material words contained in clause 5 are simply these: "The capital of the company is 1,000,000*l.* divided into 100,000 shares of 10*l.* each." I think the remaining words may be disregarded. They seem to me to have no effect.

That brings me to the consideration of what is the true construction of s. 45 of the Act of 1908. Is it a general obligation in case of alteration of preferential rights between shares, or does it only come into operation where those preferential rights are determined, not by the articles, but by the memorandum of association? I am of opinion that it only applies to cases where those preferential rights are determined by the memorandum of association, and not where they are determined by the articles of association. In the first place I think that the proviso in s. 45 is a proviso limiting the effect of the previous part of the section, and is not in any sense an independent enactment operating beyond the limits of the particular section to which it is attached. It seems to me, therefore, that in cases where a preference has been rightly given by the articles such preference can be modified by special resolution. I am confirmed in the view I take of s. 45 by the 4th article contained in Table A scheduled to the Act, which provides for the division of the share capital into different classes of shares and for the alteration of the rights attaching to any class by a resolution therein specified, which seems to me to

contemplate cases where the result can be arrived at without any modification of the memorandum of association. I come, therefore, to the conclusion that the second resolution which follows upon the resolution for reduction of capital is valid.

Now I ought to say one thing, I think, having regard to the arguments addressed to me. I see no reason why a resolution of this kind should not be made dependent upon the confirmation by the Court of the reduction of capital previously resolved upon. I think the result is that, if and when the confirmation of the Court is obtained, that resolution becomes binding; and if the Court refused its sanction, that resolution would fall to the ground. I know of no limitation in the powers of a company which prevents them passing a resolution in a conditional form of that kind. I think, therefore, that the scheme ought to be sanctioned, and that, having regard to what has taken place, it ought to be prefaced with "The Court being of opinion that the resolutions passed at the meeting were valid"—or words to that effect—"sanctions the reduction."

Younger, K.C. Then with regard to the use of the words "and reduced," we have a body of evidence to shew that the use of those words in Australia would be seriously misunderstood, and that it would be very unfortunate if the company were required in Australia to use those words. The registrar has hitherto dispensed with the use of those words.

NEVILLE J. Then I will dispense with their use.

Solicitors: *Markby, Stewart & Co.; Godden, Son & Holme.*

H. L. F.

PARKER J.
1909
Dec. 16.

In re MEECH'S WILL.
BUTCHERS' COMPANY *v.* RUTLAND.

[1909 M. 2510.]

Charity—Gift to Livery Company of City of London—Devise for General Purposes of Company—Authority to Company or Trustees to make Scheme for Administration of "Charity hereby created."

Property was devised to trustees in fee simple, upon trust for and to be held by the Masters, Wardens, and Commonalty of the Butchers' Company of the city of London "for the general purposes of the said company." The testator authorized the company or the trustees "to make and formulate any scheme, rules, regulations, bye-laws, or trusts for the temporary or permanent administration of the charity hereby created," and gave other directions applicable to a charitable bequest:—

Held, that the gift was not a charitable gift, and that the company was entitled (subject to obtaining the proper licence) to have the property conveyed for the general purposes of the company free from any charitable trust.

Livery companies of the city of London are not, unless there is something special in their charters, charities in any legal sense of the word.

The will of Peter Meech, of Smithfield, London, a past master of the Butchers' Company, which was dated August 31, 1908, contained the following devise: "I devise all that my freehold messuage or farmhouse and farm, with the several parcels of land and buildings belonging thereto, and known as Higher Meerhay Farm situate in the said parish of Beaminster and occupied by the executors of the late John Swaffield, and also the lime kiln erected by me thereon, now occupied by Albert Hann, and also the two freehold cottages, gardens and orchard called Swaffield, near thereto, to my trustees in fee simple, Upon trust for and to be held by the Masters, Wardens, and Commonalty of the Worshipful Company of the Art or Mystery of Butchers of the City of London, for the general purposes of the said company. I authorize the said company or my said trustees, as the case may be, to make and formulate any scheme, rules, regulations, bye-laws, or trusts, for the temporary or permanent administration of the charity hereby created, or to vest the trust property or funds in the said Butchers' Company or in any existing charity for any like purposes, and to nominate and appoint any other persons as trustees of the charity hereby created, in addition to or

substitution for my trustees or any of them, and to vest the said trust property or funds in all or any such trustees." And the testator thereby empowered his trustees at the cost of his residuary estate to make any applications to or take any proceedings before any Court or the Charity Commissioners, for the purpose of enabling them to retain the said premises unsold, or for constituting or confirming any such scheme as aforesaid. And the testator gave his residuary estate unto his trustees, upon trust after realization thereof, to pay an annuity to his wife, and, after her decease, upon trust to pay certain legacies, and, as to the ultimate residue and the income thereof not thereinbefore otherwise disposed of, he directed that his trustees should stand possessed thereof upon trust to divide the same into thirds, and to pay one third to King Edward's Hospital Fund for London, another one third to the governors of the London Hospital, and the remaining one third to the West Ham and East London Hospital and Dispensary.

The testator died on February 1, 1909, and his will was proved on June 9, 1909.

An originating summons was taken out by the Butchers' Company against the executors and trustees of the will, the Attorney-General, and the governors of the London Hospital, for (1.) a declaration that, by virtue of the devise in the will, the plaintiffs were entitled to have the farm, the lime kiln, and the two freehold cottages, gardens, and orchard conveyed to them in fee simple, for the general purposes of the company, free from any charitable trust affecting the same, or (2.) if not, that the plaintiffs were entitled to have the same hereditaments conveyed to them in fee simple as trustees for the charitable objects expressed in such will, and that such charitable objects might be defined, and, if necessary, a proper scheme settled for the administration thereof.

Romer, K.C., and *Prior*, for the plaintiffs. No trust for charitable purposes was created, but the gift is simply for the general purposes of the company. The reference to "the charity hereby created" is a mistake, and does not affect the absolute gift for the general purposes of the company.

PARKER J.
1909
MEECH'S WILL, *In re.* BUTCHERS' COMPANY *v.* RUTLAND.

Bischoff, for the trustees and executors.

Sargant, for the Attorney-General. No objection is raised by the Crown to the conveyance of the property to the company. In a recent case of *In re Barnett, Waring* v. *Paper Stainers' Company* (1), a similar gift for the general purposes of another City company was held not to constitute a charity.

A. Grant, K.C., and *T. T. Methold*, for the residuary legatees. The creation of a charity was intended by the testator. In the face of the expressions used by the testator, the company are not entitled to have the property conveyed to them free from any charitable trust.

PARKER J. In this case there appears to me to be undoubtedly, in the first instance, a good and valid gift of the property in question "upon trust for and to be held by the Masters, Wardens, and Commonalty of the Worshipful Company of the Art or Mystery of Butchers in the City of London for the general purposes of the said company." I do not think the words "for the general purposes of the said company" add anything to the words "upon trust for and to be held by the Masters and Wardens of the Worshipful Company of the Art or Mystery of Butchers in the City of London"; but they appear to me to be inserted, as is very generally done, where corporations, such as the Butchers' Company, are known to be trustees of special funds held upon particular trusts, in order to shew that the property is given to them, not on any particular trust, but for their general purposes. That is a form which I have come across a good many times, and I am not sure that I have not used it from time to time myself. It is simply equivalent to a gift to the Butchers' Company. Now that gift to the Butchers' Company is not a charitable gift, because the Butchers' Company was formed under a charter for purposes which are not charitable, though they may involve here and there objects which might, taken alone, be considered to be charitable. The only real question that has to be determined is whether what immediately follows in the will is sufficient, either to make what is prima facie an absolute gift to the company a gift for charitable purposes, or to avoid the gift.

(1) Unreported.

The words which follow are words which are only appropriate to a charitable gift. They give authority to the company or the trustees, as the case may be, "to make and formulate any scheme, rules, regulations, bye-laws or trusts for the temporary or permanent administration of the charity hereby created, or to vest the trust property or funds in the said Butchers' Company or in any existing charity for any like purposes, and to nominate and appoint any other persons as trustees of the charity being created, in addition to or substitution for my trustees or any of them, and to vest the said trust property or funds in all or any such trustees." Those words are obviously taken, just as the similar words appropriately used earlier in the will in respect of a real charity are taken, from some form of precedent of wills creating charitable gifts, the object of them being to give powers to trustees which they would not otherwise have, and the absence of which might make it more expensive to administer the fund; and from this I think it obvious that the testator or the draftsman—probably the draftsman in this case—thought that the Butchers' Company was a charity. Well, I daresay many other people think the City companies are charities, and try to make it out from time to time. But it is well settled now—at any rate unless there is something special in their charters—that they are not charities in any legal sense of the word, and the real question is only whether that mistake on the part of the testator is sufficient to justify me in depriving the company of the benefit of the gift, which in the first instance is clearly given for their benefit and for their general purposes. I think it is not, and, that being so, the original gift to the Butchers' Company remains good notwithstanding the clause which follows. There will therefore be a declaration that, by virtue of the devise, the plaintiffs are entitled, subject to obtaining the proper licence, to have the devised premises conveyed to them for the general purposes of the company, free from any charitable trust affecting the same.

Solicitor for plaintiff company: *H. J. V. Philpott.*
Solicitor for defendant trustees: *P. J. Rutland.*
Solicitor for Attorney-General: *Solicitor to the Treasury.*
Solicitors for residuary legatees: *Hanbury, Whitting & Co.*

F. E.

EVE J.
1909
May 14.

BETTS & CO., LIMITED *v.* MACNAGHTEN (1).

[1909 B. 1514.]

Company—General Meeting—Special Business—Minutes—Notice—Sufficiency—Resolutions—"Alterations or amendments"—Appointment of additional Directors.

The notice of the annual general meeting of a company stated that such meeting was for the purpose of considering and, if thought fit, passing certain resolutions, "with such amendments and alterations as shall be determined upon at such meeting." One of such resolutions was that three named gentlemen should be appointed directors. According to the minutes of the general meeting the notice was taken as read, and the three named gentlemen were proposed as directors. An amendment was, however, carried that in addition to these three gentlemen two additional named directors should be appointed. Under the articles of association of the company it was provided (54.) that the notice of an ordinary general meeting at which special business was to be transacted should specify the general nature of such special business; (69.) that the number of the directors should be no more than seven or less than three; (62.) that the signed minutes of the proceedings at a general meeting should be conclusive evidence that the proceedings were regular.

Upon motion by the company for an injunction to restrain the two additional directors from acting:—

Held, that the Court was entitled to look at the notice convening the meeting as part of the res gestæ, to see if the proceedings were regular.

Held, further, that, having regard to the terms of the articles of association, the business transacted at the meeting was within the scope of the special business indicated in the notice.

MOTION.

This was a motion on behalf of the plaintiff company that the defendants, Alfred Hill Macnaghten and Stewart Leveson Dudley Ryder, might be restrained until judgment or further order from acting or purporting to act as directors of the company.

On March 5, 1909, a notice was issued to the shareholders of the company stating that the annual general meeting would be held on March 19, 1909, "for the purpose of considering and, if thought fit, passing the following resolutions, with such amendments and alterations as shall be determined upon at such meeting." The resolutions were five in number, four of them

(1) This report has been held back by reason of an intended appeal which was not proceeded with.

relating to the ordinary business of adopting the directors' report and balance-sheet, the appointment of auditors and solicitors, the declaration of a dividend, &c.

The second resolution was as follows: "That Oliver Williams, Oliver Hering Campbell, and Alexander Colin Cazalet Campbell, be appointed ordinary directors of the company until the next ordinary general meeting of the company, and that their remuneration as such directors shall be at the rate of 200*l.* per annum each, free of income tax."

This was admitted to be special business. The meeting took place on March 19. The minutes, which were duly entered and signed, stated that the notice convening the meeting was taken as read. The resolution that the three directors named in the notice should be appointed ordinary directors of the company until the next ordinary general meeting with a remuneration of 200*l.* per annum was proposed and seconded, but an amendment was proposed and carried "that in addition to the three directors named in the resolution, Mr. A. H. Macnaghten and Mr. Leveson D. Ryder be appointed ordinary directors of the company until the next ordinary general meeting at the same remuneration, and that Mr. Oliver H. Campbell and Mr. Alexander C. C. Campbell receive no remuneration as directors, but that their salaries be increased by 200*l.* per annum each, their salary to be paid free of income tax." The amended resolution was then put and carried unanimously.

Cecil Thomas Gladstone, who filed an affidavit in support of the motion, was on the list of shareholders as the first of seven trustees jointly holding 2780 shares in the company out of a total of 3200 shares issued by the company. He stated in his affidavit that on receipt of the notice of the meeting he considered whether he should attend, and on the advice of his solicitor, in view of the fact that the notice did not indicate that anything controversial was likely to arise, he abstained from attending. On ascertaining what had taken place at the meeting he stated that in his opinion it was against the interest of the company that the defendants should act as directors, and had he known of the proposal to appoint them he would have been present and voted against it.

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By the articles of association of the company, which was registered in 1880 under the Companies Acts, it was provided:

Article 54. "At the least ten days' and not more than thirty days' notice, specifying the day and the hour at which any general meeting, whether ordinary or extraordinary, is to be held, and if the meeting is an extraordinary or an ordinary meeting at which special business is to be transacted, then specifying likewise the general nature of the special business for which the meeting is convened, or which is proposed to be transacted thereat, shall be given by letter addressed to each member at his registered place of abode . . . ."

Article 55. "All business shall be deemed special that is transacted at an extraordinary general meeting and all that is transacted at an ordinary general meeting, with the exception of sanctioning a dividend, and the consideration of the accounts, balance-sheets, and the ordinary report of the directors."

Article 62. "Minutes of the proceedings at every general meeting shall be entered and kept in a book, and the minutes so entered shall be signed in the said book by the chairman of the meeting . . . . and the said book, when so signed, shall be conclusive evidence that the proceedings minuted therein and purporting to be signed as aforesaid were regular, and actually took place as minuted at a meeting duly convened and held, and shall be binding on all members of the company for all purposes."

Article 65. "If two or more persons are jointly entitled as members to a share or shares or stock, the member whose name stands first in the register of members as one of the holders of such share or shares, or stock, shall be entitled to vote in respect of the same, to the exclusion of the others or other of such members . . . ."

Article 69. "The number of the directors shall be no more than seven, or less than three."

Article 82. "Whenever a vacancy, not being a casual vacancy, shall occur in the office of an ordinary director, the company in general meeting shall fill up the vacated office by electing a person to fill such vacancy, and shall determine for what period the person so elected shall serve as an ordinary director."

Article 83. "The company in general meeting may from time to time increase or reduce the number of directors within the limit of the 69th of these articles, and may also determine when and in what rotation such increased or reduced number is to go out of office."

P. O. Lawrence, K.C., and *Clauson*, for the plaintiff company. The notice of March 5, 1909, stating the business to be transacted at the general meeting, was insufficient. At a general meeting the nature of any special business should be specified. There is no mention in this notice of the intention to increase the number of the directors, though there was power under article 83 to make the increase. It is not a clear notice enabling a shareholder to consider if he would come or not: *Tiessen* v. *Henderson*. (1)

Gore-Browne, K.C., and *D. M. Kerly*, for the defendants. Three of the directors of the company voted for the resolution which they now seek to set aside. The proceedings at the general meeting were perfectly regular under the articles of association. The minutes of the proceedings, which were duly entered and signed by the chairman, are conclusive evidence that the proceedings were regular. A declaration by a chairman that a resolution is carried is conclusive evidence of the fact: *Arnot* v. *United African Lands, Ld.* (2); *In re Hadleigh Castle Gold Mines, Ld.* (3) The Court cannot go behind the minutes or look at the notice convening the meeting in order to see if it was sufficient. But assuming that the notice can be looked at, it does in fact state that the election of directors was one of the objects for which the meeting was called. The names of three persons were given as proposed directors, and the notice further specified that the resolution was to be proposed "with such amendments and alterations as shall be determined upon at such meeting." The amended resolution, which was in fact passed, came within that description and is valid.

P. O. Lawrence, K.C., in reply on the sufficiency of the notice. Setting out the general nature of the special business in the

(1) [1899] 1 Ch. 861, 866. (2) [1901] 1 Ch. 518.
(3) [1900] 2 Ch. 419.

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notice would be sufficient. But here the notice states that three named persons shall be proposed, with a remuneration of 200*l.* a year. That is all that could be considered at the meeting, and the notice is not a good notice of a proposal to increase the board by the addition of two new members. It does not come within an "amendment or alteration" of the suggested resolution. It is an additional resolution.

EVE J., after stating the facts, continued:—The plaintiffs allege that the addition of the names of the two defendants to the three included in the proposed resolution constituted an increase in the board which the company were incapable of making at the meeting, having regard to the notice by which the meeting was convened. Two answers have been put forward to the motion on behalf of the defendants. The minute-book is produced, the minutes of what took place at the meeting are entered in it and have been duly signed in accordance with the articles of association, and it is urged that they constitute conclusive evidence, binding upon the company and all its members, that the proceedings entered therein were regular and took place at a meeting duly convened and held. Mr. Gore-Browne therefore contends that the Court is precluded from inquiring into the sufficiency of the notice and is bound to assume that the meeting was duly convened and held. He admits that if, on the face of the minutes, material is found upon which the Court can come to the conclusion that there was any irregularity either in the meeting itself, or in the steps leading up to it, the Court can and ought to take note of such irregularity, but in this particular case he says that the notice convening the meeting does not appear on the record in the minute-book and I am not entitled to inquire into anything which does not so appear. I do not adopt that view. It appears from the minutes that the notice convening the meeting was taken as read. The duty of the secretary being to record accurately what takes place at a meeting, he either sets out the notice in the minutes, or makes an entry therein sufficient to identify any document which is read or taken as read at a meeting of this character. The mere fact that the shareholders dispense with the actual reading of the

document, the language of which is quite familiar to them, does not, in my opinion, do away with the necessity of treating that document as having formed part of what was referred to and dealt with at the meeting. In these circumstances, I must treat the notice convening this meeting as if it had been stated at length in the minutes recording the proceedings, and on this footing I hold that I am entitled and indeed bound to look at the notice as part of the res gestæ, and must read it and the rest of the record of the proceedings to see whether what was done could legitimately be done, having regard to the notice by which the meeting was convened. Was the business transacted at the meeting within the scope of the special business indicated in the notice? The defendants as a second answer to the motion contend that it was. This much I think is clear, that in convening a meeting at which special business was to be transacted the company were under no obligation to state the terms of the specific resolutions which were going to be proposed. Under the articles of association all that was incumbent upon the conveners of the meeting to do was to specify the general nature of the special business for which the meeting was convened, and although on this occasion the conveners of the meeting went out of their way to indicate in the notice with particularity the mode in which the special business was to be submitted to the meeting, their having done so cannot, in my opinion, impose any greater restrictions upon the meeting than would have been imposed upon it had the notice been in more general terms. I therefore regard this notice as indicating the general nature of the special business, and, further, the particular form in which that business was to be submitted to the meeting. The special business was the election of directors for the ensuing twelve months. Ought I to hold that the amendment which purported to reappoint the three gentlemen named in the notice as directors for the ensuing twelve months and to add two other gentlemen as additional directors was an amendment so inconsistent with the object of the meeting as stated in the notice and so irregular as to be beyond the power of the meeting? Was it, in short, such an amendment as no reasonable man would have regarded as competent to be put forward at a meeting so convened? In

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this connection it must be borne in mind that the minimum number of directors was three, and that if—as was possible—any one or more of the three individuals named in the notice failed to be re-elected, a fresh name or names would have to be submitted for appointment at the meeting. I think I must assume that the shareholders who received this notice were alive to this possible contingency, and, further, were aware that in the matter of electing directors the only restriction on the power of the company is to be found in the article which limits the maximum number to seven. With these facts present in his mind I think a reasonable man reading this notice must have appreciated that those present at the meeting would regard themselves as empowered to make such appointments to the board for the ensuing year as they thought fit so long as they did not do anything contrary to the company's regulations. No one could have thought that the meeting was convened to appoint the three named individuals without the power to substitute other qualified persons for all or any of such individuals, and there is nothing in the notice to indicate that the company will not, if they see fit so to do, exercise their power of increasing the number of directors under article 83. The special business indicated in the notice being the election of directors for the ensuing year, I think a recipient of the notice must be taken to have known that the company in general meeting might make any appointments within the limit imposed by their regulations, and I therefore make no order upon the motion except that the costs be costs in the action.

Solicitors: *Bircham & Co.; Mayo, Elder & Co.*

G. M.

RUSH *v.* LUCAS.

EVE J.
1909
Dec. 13, 14, 20.

[1909 R. 807.]

Landlord and Tenant—Agreement of Tenancy—Construction—Covenant not to plough up Pasture Lands—Waste—Good Husbandry—Costs.

By an agreement made in 1895 the predecessor in title of the plaintiff let a farm to the defendant from year to year at a rent of 250*l.* subject to twelve months' notice in writing from either party, and the tenant agreed not to commit any waste or spoil, or plough or break up any of the pasture lands, and further to farm the land upon the most approved system of husbandry practised in the neighbourhood. The farm contained 215 acres, of which the most part was pasture, but there were about 53 acres of arable land. Included in the latter was one field of 22 acres which had been regularly tilled by the tenant for thirteen seasons prior to 1894, but in 1895 the tenant laid it down in grass because the crops had deteriorated in quality and quantity. In 1901 he broke up nine acres of this field, but in 1902 he relaid it in grass.

In April, 1909, the landlord gave the tenant notice to determine the tenancy. The tenant required the landlord to pay him, when he went out, for the grass land laid down, and on the landlord's refusal the tenant threatened to plough up this land again. In an action by the landlord for an injunction to restrain the tenant from so doing:—

Held that, upon the true construction of the agreement, the tenant had not broken any of the covenants, as the "pasture lands" in the agreement referred solely to those parts of the farm which were meadow land at the date of the agreement; and, further, that ploughing the field would not have been waste or spoil on the tenant's part.

An act which admittedly would not be a breach of covenant while the tenant is not under notice is not converted into a breach as soon as notice to quit is served.

The fact that the tenant's conduct was dictated solely by a desire to force the landlord to compensate him did not affect the construction of the contract, or disentitle the tenant to the costs of the action.

WITNESS ACTION.

The question raised in this action was whether, upon the true construction of an agreement for letting a farm, the tenant was entitled to plough or break up any of the pasture lands.

The facts and pleadings are set out from the considered judgment of the Court.

In 1882 the defendant, William Lucas, became tenant of

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Cockley Hill Farm, situate in the parishes of Farthinghoe and Greatworth, in the county of Northampton. No written agreement of tenancy was entered into until he had been in occupation for thirteen years, and then on the occasion of a reduction being made in the rent of the farm an agreement was signed. This agreement was dated March 18, 1895, and was made between the plaintiff's predecessor in title of the one part and the defendant of the other part, and was expressed to be an agreement for taking the farm from April 6 then next for one year, and so on from year to year, at the yearly rent of 250*l.*, subject to twelve calendar months' notice in writing from either party; and the tenant thereby agreed not to commit any waste or spoil, or plough or break up any of the pasture lands, and further to farm the land upon the most approved system of husbandry practised in the neighbourhood, and not to mow the grass land more than once in any one year.

The agreement stated the acreage of the farm to be 215 acres and eight poles, but contained no further particulars by way of schedule or otherwise as to the inclosures or closes making up the acreage, or as to their then state of cultivation.

It was proved that the farm consisted for the most part of pasture land, the arable land being represented by three fields of an aggregate acreage of 53¾ acres or thereabouts. Included in the latter was a field known as the Far Ground, containing nearly 22½ acres. This field had been regularly tilled by the tenant during the thirteen seasons 1882 to 1894 inclusive, but in March or April, 1895, when it was planted in spring corn (wheat, barley, and oats), the tenant sowed it all over with a mixture of red and white clover, trefoil, and perennial rye grass. This course he adopted because the crops had deteriorated in quantity and quality and the field could no longer be tilled to a profit. In 1901 he broke up nine acres of the lower part of the field and tilled it to wheat, but the wheat having been destroyed by wireworm, he in the spring of 1902 retilled the nine acres in oats, and therewith sowed a mixture of trefoil, red clover, and grass. He mowed the upper part of the field once in each year from 1895 to 1908 inclusive, and the lower part in each year from 1895 to 1901, and from 1903 to 1908 inclusive.

On April 6, 1909, the landlord gave the tenant notice determining the tenancy at the end of twelve months. The tenant thereupon sold off most of his stock and let the grass keep on the farm at an auction sale which took place on April 20.

At the sale an inquiry was made of the landlord's agent whether the landlord would be prepared to pay the defendant, when he went out, for the grass laid down in the Far Ground, and, no satisfactory reply being received, the defendant expressed his intention of ploughing it up if it were not paid for, and the pasture thereon was sold at 10*s*. per acre subject to a special condition under which the purchaser was bound to give up possession at any time on notice.

Subsequent to the auction a correspondence took place between the respective agents of the plaintiff and defendant in which the questions of the defendant's claim to be paid for the grass and of his right to plough it up were discussed, and on May 19 the plaintiff's solicitor wrote that the plaintiff would not pay for the grass and would not allow it to be ploughed up, and he added that if the defendant attempted to plough it up he would at once apply for an injunction. On May 26 and 28 the defendant's agents wrote that the defendant intended to plough the field, and refused to give any undertaking not to do so, and on June 1, 1909, the writ in the action was issued.

By the indorsement on the writ the plaintiff claimed a declaration that, upon the true construction of the agreement, the defendant was not entitled to commit any waste or spoil, or plough or break up any of the pasture lands on the farm, and an injunction in the terms of the declaration.

In paragraph 14 of the statement of claim the agreement of tenancy was stated, and the only covenant on the part of the defendant specifically referred to was the covenant not to commit any waste or spoil, or plough or break up any of the pasture lands. In paragraph 21 it was alleged that the defendant threatened and intended to plough up a piece of pasture land forming part of the farm, and in paragraph 22 it was further alleged that if the said piece of pasture land was ploughed up the property of the plaintiff in the farm would be seriously diminished in value and the plaintiff would suffer serious damage

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and loss. By the prayer the plaintiff claimed an injunction to restrain the defendant from ploughing or breaking up any of the pasture lands forming part of the farm.

Evidence was given on behalf of the plaintiff to the effect that the field in question was more suitable for pasture than for arable cultivation, and that according to good husbandry a prudent farmer would keep the field in pasture.

Stafford Crossman (*Jessel, K.C.*, with him), for the plaintiff. The evidence shews that the land is not mere temporary grass land, but is now carrying a good sward; that it is good land which ought not in the ordinary course of good husbandry to be broken up; and that the defendant cannot get any benefit from ploughing up the field, or make any profit by so doing.

The defendant's covenant not to commit waste covers this case. He has also covenanted to farm the land in the most approved system of husbandry practised in the neighbourhood. In the absence of any agreement to the contrary, every tenant is bound to cultivate his farm in a husbandlike manner: per Gibbs C.J. in *Brown* v. *Crump* (1); *Onslow* v. —— (2); *Westropp* v. *Elligott.* (3) There is something more than a mere covenant not to commit waste; there is an implied covenant to cultivate in a reasonable manner. The fact that he is an outgoing tenant has a great bearing on the question of reasonableness: *Watherell* v. *Howells.* (4)

There is no question about compensation in this case. Because the defendant does not choose to get his compensation in the proper recognized legal manner, that does not entitle him to injure the reversion.

P. O. Lawrence, K.C., and *Cecil Walsh*, for the defendant. First, there has been no waste committed here. *Goring* v. *Goring* (5) is decisive upon that point. Here it is only a question of what is the bargain between the parties. Secondly, the pasture which was ploughed up was not permanent pasture. There was no contract that this land should not be ploughed up. What

(1) (1815) 1 Marsh. 567, 569.
(2) (1809) 16 Ves. 173.
(3) (1884) 9 App. Cas. 815, 823-4.
(4) (1808) 1 Camp. 227.
(5) (1676) 3 Swans. 661.

was not to be ploughed up was the "pasture land" existing at the date of the agreement. That is the true construction of the agreement.

Then it is sought to establish that it was not in accordance with the approved system of husbandry to plough up this land. But the field was treated as arable land in the lease, and it cannot be bad husbandry to plough it up at the proper season of the year. The only way the landlord can stop it is by shewing either an express or implied covenant not to plough it up. Cases were cited to shew that there was an implied condition wider than the expressed condition, but the Court will not look outside the agreement. There is, in fact, an implied covenant that he has a right to plough this field, and if the tenancy had continued he would have been entitled to do it. The fact that a notice to quit was given by the landlord cannot alter the rights of the tenant under the agreement.

Jessel, *K.C.*, in reply. The real question is whether it was in accordance with good husbandry to plough up this pasture, having regard to the relation of the parties. The defendant is not entitled to use this agreement in order to compel the landlord to give him something to which he is not by law entitled.

Cur. adv. vult.

Dec. 20. EVE J., after setting out the facts and pleadings as above stated, continued:—Upon his pleadings, the plaintiff based his claim to relief upon the covenants against committing waste or spoil, or ploughing or breaking up any of the pasture lands, and the first question is whether the defendant has ever threatened to do anything which would be a breach of those covenants, or either of them.

In my opinion he has not. I think the expression "the pasture lands" in the agreement refers solely to those portions of the farm which were meadow land, or laid down permanently to grass at the date of the agreement, and that it would be straining the language beyond all reasonable limits were I to hold that a field tilled to corn at the date of the agreement and for at least thirteen years previous thereto had become pasture

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land within the meaning of the covenant because the tenant had in subsequent years left it for a considerable period in grass.

Nor do I think that ploughing the field would have been "waste or spoil" on the tenant's part. Some reliance was placed in argument on the use of the two words "waste or spoil," but in my opinion they are synonymous, though possibly the one may be more appropriately used for what is in its nature permissive and the other for what is in its nature destructive. I think the argument on this covenant is effectively disposed of by the decision in *Goring* v. *Goring*. (1)

Upon the case, therefore, as pleaded, the plaintiff fails, but at the trial reliance was also placed on the tenant's covenant to farm the land upon the most approved system of husbandry practised in the neighbourhood. Evidence was called for the plaintiff to prove that, having regard to the situation of the field and its general character, it is more suitable for pasture purposes than for arable cultivation, and further that the present condition of the grass laid down there is such as would lead the practical and prudent farmer to continue the field in its present condition, and not to break it up.

On the question of construction it is impossible for me to attach much weight to this evidence. So much of it as relates to the position and character of the field is really beside the mark altogether, as the field was let to the defendant as an arable field and he was entitled so to use it, and so much of it as relates to what ought now to be done with the field is discounted by the circumstance that none of the witnesses suggested that breaking up the field would be a breach of the covenant under consideration, and one of them at least stated that if the tenancy were a continuing one, and the tenant was not under notice to quit, the landlord could not complain of his conduct in ploughing the field. The evidence had in fact been prepared with the object of supporting the case of waste or spoil as pleaded, and not of the alternative case made at the trial.

In my opinion there is nothing to support the attempt made to prove a threatened breach of the covenant to farm on the most approved system, and I do not accept the proposition that an act

(1) 3 Swans. 661.

which, admittedly, would not be a breach of such a covenant while the tenant is not under notice, is converted into a breach so soon as notice to quit is served upon him.

I think, therefore, that the action fails and must be dismissed. The fact that the defendant's conduct has been dictated solely by a desire to force the plaintiff to compensate him for the grass laid down—as the defendant himself admitted was the case—cannot, in my opinion, affect the construction of the contract between the parties, and the main reason why I reserved judgment was that I might have an opportunity of considering whether I ought to make it a ground for depriving the defendant of his costs. On the whole, seeing that the action was founded on breach of contract and that alone, and that no other case against the defendant is alleged, I think I ought not to treat matters altogether outside any question of construction, that is to say, the defendant's motives, as sufficient grounds for depriving him of his costs. Accordingly I dismiss the action with costs, and the order will be prefaced by the statement, which the defendant has made through his counsel at the bar, that he does not now intend to plough or break up the field in question.

Solicitors: *Hugh Powel Davies; Harman & Son, for H. F. Bennett, Banbury.*

G. M.

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[1909 G. 2027.]

[MANCHESTER DISTRICT REGISTRY.]

Company — Shares — Executors — Production of Probate — Transfer to One Executor—Nominal Consideration—Breach of Trust—Notice—Revocation of Signature by One Transferor—Rectification of Register—Registered Joint Holders—Director—Qualification.

The plaintiff and others were executors of a shareholder in the defendant company. The company on production of probate registered them as joint holders of the shares. The plaintiff was afterwards appointed a director of the company subject to his acquiring the necessary qualification. The articles of association required each director to be the registered holder of not less than twenty shares. The plaintiff already held five shares in his own name. The executors executed a transfer of fifteen of the testator's 112 shares to the plaintiff for a nominal consideration. On the next day one of the transferors wrote to the company revoking his signature of the transfer and notifying the company not to register the transfer. The directors of the company thereupon refused to register the transfer, and subsequently informed the plaintiff that he had ceased to be a director, not having acquired the necessary qualification within the statutory period, and thenceforth excluded him from the directors' meetings. In an action by the plaintiff for an injunction to restrain the directors from excluding him, and for rectification:—

Held, that the notice acquired by the company by production of probate was limited to a notice of the names and addresses of the persons who had constituted themselves the executors of the testator, and the company were not justified in gratuitously assuming that the transfer necessarily involved a breach of trust and, in the absence of any specific reason for the withdrawal of the signature, in refusing indefinitely to register the transfer; and that the register must be rectified by the registration of the transfer.

Held, further, that the plaintiff was qualified to be a director of the company by virtue of his registration as a joint holder of the testator's shares.

In re Glory Paper Mills Co., [1894] 3 Ch. 473, applied.

WITNESS ACTION.

The plaintiff, James Arthur Grundy, was one of the executors and trustees of the will of his father, James Grundy, who died on December 24, 1901. He was also beneficially interested in one eighth part of his father's estate. His co-executors were

his mother, Martha Grundy, his brother, Albert Edwin Grundy, and his sister, Edith Mary Grundy.

The defendants T. Briggs, J. L. Shawe, and Alfred Ernest Grundy were three of the directors of the defendant company, the Brynn Hall Colliery Company, Limited.

Part of the testator's estate consisted of 122 shares of 100*l.* each in the capital of the defendant company. In January, 1902, the executors produced the probate at the company's offices and were registered as the joint holders of the shares, being described in the register as "the widow and co-executors of James Grundy deceased." Ten of these shares were subsequently transferred by the executors, leaving 112 shares standing in their joint names.

The plaintiff was also the registered holder of five shares of the defendant company in his own name.

In September, 1908, the defendant company was proposing to acquire another colliery company, to the acquisition whereof the plaintiff strongly objected on the ground of its undesirability.

At the annual general meeting of the company held on February 20, 1909, the plaintiff was appointed a director of the defendant company on the nomination of some of the shareholders.

Article 61 of the defendant company's articles of association provided that "each of the directors shall be the registered holder of not less than twenty shares."

On his appointment as director of the defendant company the plaintiff obtained a transfer, dated February 25, 1909, into his own name of fifteen of the above-mentioned 112 shares. The transfer was duly executed by the plaintiff and his three co-executors and was expressed to be made in consideration of ten shillings.

On February 26, 1909, Albert E. Grundy, one of the executors, sent a letter to the defendant company to the following effect: "Gentlemen,—Yesterday I signed a transfer in favour of my brother Mr. J. A. Grundy transferring to him fifteen shares in your company. Kindly note I have revoked my signature, and that you must not register the transfer."

On March 12, 1909, the transfer was sent by the plaintiff to

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the company for registration. Previously to that date the plaintiff had attended three meetings of the directors.

On April 24, 1909, there was a meeting of the defendant directors, of which the plaintiff had received no notice, and at which the transfer and letter were brought to the attention of the defendant directors, who thereupon refused to register the transfer.

On April 26, 1909, the plaintiff received a letter from the defendant company's solicitor informing him that he had ceased to be a director because he had not taken up the qualification shares within the statutory period, and the plaintiff had ever since been excluded by the defendant directors from directors' meetings.

The plaintiff then commenced this action for an injunction restraining the defendant directors from preventing or hindering him from acting as a director of the defendant company and from excluding the plaintiff from the directors' meetings, and for rectification of the register by inserting his name as holder of the fifteen shares comprised in the deed of transfer.

Jessel, K.C., and *Ward Coldridge*, for the plaintiff. The plaintiff is a properly qualified director of the company and has complied with the requirements of article 61. He was in fact the holder of not less than twenty shares. The holding of shares jointly with others has been held to be a sufficient qualification: *In re Glory Paper Mills Co.* (1); *In re T. H. Saunders & Co., Ld.* (2); *Pulbrook* v. *Richmond Consolidated Mining Co.* (3)

The transfer to the plaintiff of the fifteen shares was properly executed, and the defendant directors were not justified in refusing to register it.

P. O. Lawrence, K.C., and *Courthope Wilson*, for the defendant directors. The company were legally justified in refusing to register the transfer of the fifteen shares under the circumstances. One of the signatories to the transfer had cancelled his signature, to their knowledge, and they would have been guilty of assisting at a breach of trust had they registered it. They

(1) [1894] 3 Ch. 473. (2) [1908] 1 Ch. 415.
(3) (1878) 9 Ch. D. 610.

had no authority for putting the investment into the name of one of the four persons who were the personal representatives of the late shareholder.

Then, upon the construction of the articles, and in particular of article 61, a joint holder of shares with other persons is not properly qualified as a director. The plaintiff was not the registered holder of twenty shares. He was merely the holder of five shares and one of the four joint holders of 112 shares; and he was elected a director subject to his acquiring the proper qualification. Under article 61 each director was to be the registered holder of not less than twenty shares. *Pulbrook* v. *Richmond Consolidated Mining Co.* (1) and *In re Glory Paper Mills Co.* (2) did not lay down any such proposition that a joint holding of shares would be enough under an article such as this, the object of which is that the director shall have a personal stake in the company. The words and facts in this case are different from those in *In re Glory Paper Mills Co.* (2) That case does not decide that such a qualification would be good in every case.

If for the purposes of article 61 the plaintiff had been asked "Are you the holder of twenty shares?" we submit that he could not truthfully have answered "Yes."

Stewart-Smith, K.C., and *Courthope Wilson*, for the defendant company. The company is only interested so far as the action relates to rectification of the register.

The plaintiff must shew that he has a present and unconditional right to registration, and he cannot do that. Further, this action is in effect an action for specific performance of an agreement by some trustees to transfer shares for a nominal consideration to their co-trustee, all parties having knowledge that the transfer was a breach of trust. The probate had been produced to the company, and it is clear that the company knew that these transferors were executors, and the letter was notice that there was a breach of trust.

Directly the prior equitable title comes to the knowledge of the company the company must stay its hand: *Ireland* v. *Hart* (3); *Roots* v. *Williamson*. (4) The Court will not insist upon any one

(1) 9 Ch. D. 610.
(2) [1894] 3 Ch. 473.
(3) [1902] 1 Ch. 522.
(4) (1888) 38 Ch. D. 485.

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doing anything that is a breach of trust—Fry on Specific Performance, 4th ed., par. 407—and we rely on the cases there cited.

Jessel, K.C., in reply. *In re Glory Paper Mills Co.* (1) is of general application and applies here. It was right that the executors of one of the largest shareholders should have a voice on the board. The position of the estate, and not of the company, has to be regarded.

The object of a qualification clause is that the director may have or may be entrusted with an interest in the company. Because others are registered that does not make him any the less a registered holder. In *Sutton* v. *English and Colonial Produce Co.* (2) the form was different and expressly excluded joint ownership, but even then "in his own right" does not necessarily mean as owner of the beneficial interest. No breach of trust has been proved; it was a mere act of administration, and was within their powers: *Greenwell* v. *Porter.* (3)

EVE J. stated the facts as above set out, and continued:—The defendants contend that the company were justified in not registering the transfer, that in fact they would have been guilty of facilitating, or even completing, a breach of trust had they registered it, and that no Court will put the company or the directors in a position where that would be a possible result of their conduct. They say, therefore, that so far as the transfer was concerned they were justified in the attitude which they took, and which they still take, in asserting that it ought not to be registered. With regard to the other point they submit that, according to the true construction of the articles in the case of this company at any rate, a person is not qualified as a director by the holding of shares jointly with other persons.

I will deal with those points separately, and first, as to the refusal to register the transfer, I must ascertain exactly what it was the company knew, or must be taken to have known, at the date when, acting through their agents, they took upon themselves to refuse to register the transfer. They knew, of course,

(1) [1894] 3 Ch. 473. (2) [1902] 2 Ch. 502.
(3) [1902] 1 Ch. 530.

that James Grundy was dead ; they knew further that, according to the probate which had been produced to them, his executors were his widow, his two sons, and his daughter. I am not prepared to hold, nor do I think I should be right in holding, that the company had notice of any other of the contents of the testator's will. In my opinion it would be a most dangerous thing to hold that a company, to whom the probate is produced for the purpose of establishing who are the legal personal representatives of the deceased shareholder, are thereby affected with notice, express or otherwise, of the other contents of the testator's will. I think, therefore, that the notice which the company had from the probate was limited to a notice of the names and addresses of the persons who had constituted themselves the legal personal representatives of the testator. From this information they also gathered when the transfer was lodged that it purported to be signed by the four persons who had been registered as the legal personal representatives of the late shareholder, that those four persons were purporting to assign to one of their number fifteen shares which had belonged to the testator, and that the consideration for the transfer was a nominal one, and they further had before them the statement in the letter of February 26 that one of the persons who had signed the transfer purported to have revoked his signature. Now beyond that, in my opinion on the evidence as it stands, the company had no notice whatever of any fact which it was in the least material for them to know, and the question is whether, with that notice and nothing more, the company and the directors were justified in refusing to register this transfer. As a matter of policy it appears to me that the proper course for the company to have adopted in that position was to have given to Mr. Albert E. Grundy notice that unless within a limited time, and a strictly limited time, he took legal proceedings to prevent the company from proceeding to register the transfer, the company would, at the expiration of the time limit, register the transfer so lodged with them. This I think is the practice usually adopted, but, instead of adopting that course, the defendants took it upon themselves, and are taking it upon themselves to-day, to assume that Mr. Albert E. Grundy withdrew his signature, or, as

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he puts it, revoked his signature, upon the ground that the execution of the transfer constituted a breach of trust on his part. I have no evidence on which I could conclude at this moment that the execution of the transfer did constitute a breach of trust, but even if it did, Mr. Albert E. Grundy never gave the company any notice of the grounds upon which he had withdrawn or revoked his signature, and I think the defendants were altogether wrong in gratuitously assuming that the transfer necessarily involved a breach of trust. At the present moment the matter is left wholly in the dark. For all I know, Albert E. Grundy may have been induced by somebody who did not approve the accession of James Arthur Grundy to the board to withdraw his signature, without knowing or caring whether the transaction was a breach of trust or not, for the sole purpose of excluding James Arthur Grundy from the directorate. In the absence of evidence I am not going to assume the transfer was executed in breach of trust, nor do I think the company were justified in the circumstances in taking it upon themselves to make any such assumption. I cannot help thinking that the action of the defendants in refusing to register this transfer has been prompted not so much by any fear or proof of any possible breach of trust that the transferors were committing as by a perhaps not unnatural desire to avail themselves of any opportunity for avoiding an unwelcome addition to the board. But, whatever be the motive which led the company to espouse the cause of the repudiating transferor, the result in my opinion is not justified, and I must make an order the effect of which will be to direct the company to register the transfer of the fifteen shares, and, that having been done, the plaintiff will be qualified as a director whatever be the correct view of the other point raised by the defendants.

And there I might leave matters, but inasmuch as the case may go further, I will state the conclusion at which I have arrived on the other point which has been argued before me, the point whether the inclusion of Mr. James Arthur Grundy's name as one of the joint holders of the 112 shares is a sufficient qualification within the meaning of these articles. The qualification which a director in this company is required to hold is

substantial, amounting to a pecuniary interest of 2000*l.*; the company is more or less in the nature of a private company, and it is natural that the shareholders should expect and should provide that the management should be in the hands of persons having a substantial interest in the company's welfare. But two points are to be observed with regard to that. In the first place, there is no clause in the articles which requires the director to hold this qualification in his own right. It is quite obvious that the company's constitution contemplated that a man might be a director in a representative capacity; that is to say that the shares which he held might not be his, but somebody else's. In the next place, shareholders are mortal, and in concerns of this nature the last thing which the company desire when a shareholder dies is that his interest should be put upon the market. What the shareholders desire is that as far as possible in private companies of this sort—I am not using the words "private company" in their strictly statutory meaning—there should be a continuity of shareholders; that the market should not be disorganized or their property be depreciated by an immediate realization of shares in case of death. On the other hand, each and all of the shareholders, especially those of them who were directors, would of course desire, if the shares are retained by the estate, that the persons representing the estate should, if possible, have some voice in the management of the company. Taking all these matters into consideration, what I have really to determine here is whether the wording of article 61, dealing with the qualification of a director, is such as to exclude the operation of those authorities by which the holding of shares jointly with others has been held to be a sufficient qualification. Article 61 is in these terms: [His Lordship read the article, and continued.] Was Mr. James Arthur Grundy the registered holder of not less than twenty shares at the moment when he, his mother, his brother, and his sister were jointly registered as holders of 112 shares? I think he was. I think if anybody had asked what Mr. James Arthur Grundy's holding in the company was, or of what shares he was the registered holder, the reply must have been that he was the registered holder of five shares in his own name and of 112 shares in the joint names of his mother,

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his brother, his sister, and himself, and I think I should be really disregarding the explicit expression of opinion both by Lindley L.J. and Davey L.J. in *In re Glory Paper Mills Co.* (1) if I were to hold that this article has been so framed as to exclude the operation of that decision. On the second point also I am therefore of opinion that the contention of the defendants is wrong, and that Mr. James Arthur Grundy was continuously from February 20 qualified to be a director of the company. In these circumstances, to the order which I have made I must add the injunction which is asked by paragraph 1 of the claim, and I must direct that the costs of the action be paid by the defendants.

Solicitors: *Fowler & Co., for Grundy, Lamb & Grundy, Manchester; Blundell, Gordon & Co., for James Barton, Wigan.*

R. M.

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Jan. 21.

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[1909 E. 1087].

Lessor and Lessee—Lease—Covenant—Licence to Assign—"Not to be unreasonably or arbitrarily withheld"—Unreasonable Condition—Declaratory Order—Costs.

By a lease made in 1901 a house in Oxford Street was demised by the defendants to the predecessors of the plaintiff for thirty-one years, less fifteen days, at a rent of 450*l.* a year. The lease contained some onerous covenants, including a covenant by the lessees that they would not, without the licence in writing of the lessors (such licence not to be unreasonably or arbitrarily withheld), assign, transfer, or underlet the demised premises. In 1905 the plaintiff purchased the residue of the term in the lease and desired to assign it to his wife. The lessors objected to an assignment to a married woman, and would only grant their licence to assign on condition that the plaintiff executed a covenant for himself, his executors and administrators, at all times during the continuance of the lease of 1901 to pay the rent and perform all the covenants, agreements, and provisions contained in the said lease, as if he had been a party thereto.

Upon a summons in an action by the lessee against the lessors, the

(1) [1894] 3 Ch. 473.

lessee claimed a declaration that he was entitled to assign the lease without the licence of the lessors, and free from conditions :—

Held, that the condition sought to be imposed by the lessors was altogether unreasonable, and the declaration asked would be made ; but as no relief was sought against the lessors the declaratory order would be made without costs, according to the principle laid down by Swinfen Eady J. in *Jenkins* v. *Price*, [1907] 2 Ch. 229.

ADJOURNED SUMMONS.

By a lease dated August 8, 1901, made between the defendants, Samuel Sealey Levy and Morden Solomon Levy (the lessors), of the one part, and William Bowles and Helen Susannah Doxey (the lessees) of the other part, the lessors, by virtue of the powers contained in the will of one Samuel Solomon, and in pursuance of an order made in an action, demised unto the lessees the piece of ground and messuage No. 516, Oxford Street, Marylebone, in the county of Middlesex, from June 24, 1901, for the term of thirty-one years, less fifteen days, at the rent of 350*l.* up to June 24, 1902, and after that date, and thenceforth during the residue of the term, the rent of 450*l.* And the said lease contained, inter alia, covenants by the lessees to pay the rent, to execute certain specified alterations and improvements, to paint and keep the premises in repair, &c.; and the lessees further covenanted that they would not, without the licence in writing of the lessors under their hands for that purpose first had and obtained (such licence not to be unreasonably or arbitrarily withheld), assign, transfer, or underlet the said premises. The premises No. 516, Oxford Street formed part of the estate of Samuel Solomon, deceased, which was now being administered in the Court of Chancery, and the defendants were the trustees, appointed by the Court, of the will of S. Solomon. Various assignments of the lease took place, and ultimately, by a deed of March 6, 1905, the premises in question were surrendered and assigned to the plaintiff, James Samuel Evans, in consideration of 1250*l.* He now desired to assign the residue of the term in the lease to his wife, Mrs. Amy Burgess Evans, upon whom he had made no settlement on marriage. A correspondence took place between the solicitors of the parties, which is sufficiently stated in the judgment of the Court. The lessors objected to the assignment on the ground that Mrs. Evans

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was a married woman, and they were not satisfied that in her hands the payment of the rent and the performance of the other obligations of the lease would be secure.

On September 17, 1905, a draft form of licence to assign, in the nature of a deed under seal, was sent to J. S. Evans by the lessors' solicitors, and by that licence it was witnessed that, in pursuance of a covenant thereinafter contained, the lessors granted their licence for an assignment of the lease by J. S. Evans to his wife, provided that the licence should not authorize any further or other assignment, underletting, or parting, wholly or partially, with the possession of the premises, or any part thereof, by Mrs. Evans; and in consideration of the granting of the licence J. S. Evans was thereby made to covenant for himself, his executors and administrators, with the lessors, their heirs and assigns, that he would at all times during the continuance of the lease of August 8, 1901, pay the rent reserved by, and duly perform and observe all the covenants, agreements, and provisions contained in, the lease of August 8, 1901, as if he had been a party to the same.

Mr. Evans declined to accept the licence in this form and to remain liable for the covenants of the lease on assigning the same to his wife, and considered the demand of the lessors to be unreasonable.

Accordingly, on November 6, 1909, a summons was taken out on behalf of Mr. Evans asking that it might be declared that, upon the true construction of the lease of August 8, 1901, and in the events which had happened, the plaintiff was entitled to assign the residue of the term to his wife without the consent of the lessors, and free from conditions. The defendants had obtained the leave of the Court to defend the proceedings instituted by the plaintiff.

Stewart-Smith, K.C., and *Cozens-Hardy*, for the plaintiff.

[EVE J. Is this a proper case to be decided on summons?]

There is authority for the application in this form: *Young* v. *Ashley Gardens Properties, Ld.* (1); *In re Spark's Lease.* (2)

The defendants say they have a discretion to exercise upon

(1) [1903] 2 Ch. 112.

(2) [1905] 1 Ch. 456.

the application for licence to assign, and they do not choose to exercise that discretion. The only ground alleged for refusing is that Mrs. Evans is a married woman. The lessee here is, under the circumstances, entitled to disregard the covenant and to assign without consent: *Andrew* v. *Bridgman.* (1)

P. O. Lawrence, K.C., and *A. dB. Terrell*, for the defendants. The attitude of the defendants, who are trustees, is not unreasonable. There may be difficulties in enforcing the covenants in this lease against a married woman. There are onerous covenants in the lease. The trustees are defending the action with the sanction of the Court. A landlord is not bound to give his reason for refusing the licence to assign.

EVE J. In the year 1905 Mr. Evans, the applicant upon this summons, purchased certain premises in Oxford Street held on lease for the residue of a term of thirty-one years from June 24, 1901, for the sum of 1250*l.* The respondents are the reversioners, and the premises are vested in them as part of an estate of which they are the trustees. Shortly after the purchase, being desirous of assigning the lease to his wife, upon whom he had made no settlement at the time of their marriage, Mr. Evans instructed his solicitors to apply to the lessors for their licence for such proposed assignment, and in reply the solicitors to the lessors forwarded a form of the licence which the lessors were prepared to give. This document incorporated the conditions upon which the licence would be granted, and was intended to be signed by the applicant. Before reading it, I will read the covenant in the lease. It is in these terms: [His Lordship read the covenant and the form of licence, and continued:—]

The rent reserved by the lease is a substantial one of 450*l.* per annum, and the covenants as to repair and maintenance of the premises are onerous. Mr. Evans objected to the form of licence, the more so as it was contemplated that his wife might wish to realize the investment at an early date. A correspondence then followed between the respective solicitors, in which the views of each party were stated, and which culminated in the letter of October 11, 1909, wherein the solicitors to the lessors

(1) [1908] 1 K. B. 596.

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wrote: "The lessors of the above premises absolutely refuse their licence to the proposed assignment by Mr. Evans, unless he is prepared to be a party thereto, as provided by the form of licence we submitted for your approval, and if your client assigns without licence, he must do so at his own peril." This put the assignor in a difficult position, for if he assigned the lease without licence he would risk the forfeiture of the property. Accordingly he issued this summons on November 6, 1909, by which he asks the Court to declare that the conditions which the lessors have sought to impose upon him with regard to the licence to assign are unreasonable. It occurs to me that the lessors would not have been unreasonable, having regard to the fact that the proposed assignee was a married lady, had they required from Mr. Evans a covenant as surety for his wife before they gave him permission to assign the premises to her, but, in my opinion, it was altogether unreasonable to ask him to enter into a covenant the effect of which would be to render him liable during the whole residue of the term for the rent, and in respect of all the covenants in the lease, as a condition precedent to the licence to assign being granted. In these circumstances, I have arrived at the conclusion that this condition ought not to have been imposed, and I think I must make an order following that made in the case of *Young* v. *Ashley Gardens Properties, Ld.* (1), and declare that the condition made by the lessors was one which they were not entitled to make as a condition of giving their consent to the assignment.

The question as to whether or not the lessors should be ordered to pay the costs of the lessee was then argued.

P. O. Lawrence, K.C., for the lessors. According to the decision of Swinfen Eady J. in *Jenkins* v. *Price* (2) the lessors ought not to be ordered to pay the costs of the lessee. There is no question of construction and no claim for damages.

Stewart-Smith, K.C., for the plaintiff. We have succeeded in the action and obtained the declaration asked for and are entitled to the costs of the action. In *Young* v. *Ashley Gardens Properties, Ld.* (1) the lessors were ordered to pay the costs of

(1) [1903] 2 Ch. 112.

(2) [1907] 2 Ch. 229, 235.

the action for unreasonably refusing a licence to assign a lease. The unsuccessful party ought to pay the costs: *Attorney-General* v. *Merthyr Tydfil Union.* (1)

EVE J. I assume for present purposes that the costs are in my discretion, but even so the Court must be guided by principle in determining how they shall be borne, and I think in the case of *Jenkins* v. *Price* (2) Swinfen Eady J. does lay down a principle applicable to the case. He there points out that the lessee, in cases of this description, comes to the Court claiming a declaratory judgment, but no other relief, against the lessor, that there is no covenant by the lessor to give a consent, and that the only result if he unreasonably withholds his consent is that the lessee can then assign without his consent. Swinfen Eady J. accordingly there held that, although the lessee was entitled to a declaration, he could not recover against the lessor the costs of action, there being no cause of action against the lessor. The question is whether, when the lessor merely disputes the right of the applicant to the declaration which he is seeking, there is any principle upon which the Court ought to order the lessor to pay the costs of the lessee. It is said, on the one hand, that the Court ought to order the lessors to pay the costs, because they have disputed the lessee's right to assign the lease. On the other hand, in the absence of any cause of action on the part of the lessee against the lessors, ought I, on principle, to give the costs to the lessee? I do not think I ought to, unless the lessors have been guilty of conduct which has imposed upon the lessee costs which the proceedings ought not to have occasioned. In the present case the matter has been perfectly fairly dealt with, and I think that the declaration for which Mr. Stewart-Smith asks must be made, but I think it ought to be made without costs.

Solicitors: *Gibson, Usher & Co.; Osborn-Jenkyn & Son.*

(1) [1900] 1 Ch. 516, 525.

(2) [1907] 2 Ch. 229, 235.

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Jan. 25;
Feb. 8, 9.

In re LIFE AND HEALTH ASSURANCE ASSOCIATION, LIMITED (In Liquidation).

[1901 L. 01.]

Life Assurance Company — Liquidation — Transfer of Business to another Company—Deposit—Repayment—Rights of Policy-holders—Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *ss.* 3, 14—*Life Assurance Companies Act*, 1872 (35 & 36 *Vict. c.* 41), *s.* 7.

A life assurance association which has not accumulated out of premiums a life assurance fund of 40,000*l.* according to s. 3 of the Life Assurance Companies Act, 1870, and which has gone into voluntary liquidation and transferred its business to a purchasing company, is not entitled to a return of any part of the statutory deposit of 20,000*l.*, unless all its policy-holders have released and abandoned their claims against the association and the deposit, and accepted the liability of the purchasing company, such abandonment and acceptance being signified in writing, pursuant to s. 7 of the Life Assurance Companies Act, 1872.

Ex parte Scottish Economic Life Assurance Society, (1890) 45 Ch. D. 220, followed.

Petition.

This was a petition by the Life and Health Assurance Association, Limited, and its liquidators, and the General Accident, Fire, and Life Assurance Corporation, Limited (the purchasing company), asking that out of the statutory deposit of 20,000*l.* a sum of 5500*l.* might be paid to the purchasing company, as representing the interest of the transferred policy-holders therein, and that the balance might be paid to the liquidators of the association.

By s. 3 of the Life Assurance Companies Act, 1870, every life assurance company on commencing business was required to make a deposit of 20,000*l.*, and the Accountant-General "shall return such deposit to the company so soon as its life assurance fund, accumulated out of the premiums, shall have amounted to 40,000*l.*" The Life and Health Assurance Association, Limited, duly made the required deposit of 20,000*l.*, but its accumulated fund never amounted to 40,000*l.*

A further difficulty was occasioned by the provisions of s. 7 of the Life Assurance Companies Act, 1872. (1)

The other facts are fully stated in the judgment of the Court.

Stewart-Smith, K.C., and *J. M. Gover*, for the petition. This deposit is assets of the association. It is a security for the liability under the life policies and is limited to that; after such liability is satisfied the deposit is available for payment of debts. Under the arrangement whereby 5500*l.* is estimated as the amount of the deposit applicable to the life policies there is no further liability of the association to the policy-holders: *In re Popular Life Assurance Co.* (2) In that case the 20,000*l.* deposit was paid out to the purchasing company in somewhat similar circumstances, but there the vendor company had been dissolved, and here the liquidation is continuing.

[EVE J. According to the statute there is no right to have a return of the deposit until the insurance fund amounts to 40,000*l.*]

If so, the 20,000*l.* may be locked up for ever.

[EVE J. According to s. 7 of the Life Assurance Companies Act, 1872, there must either be a novation of the contract or an abandonment of any claim by the policy-holders.]

There are 262 policy-holders, and the greater number of these have paid their renewal premiums to the purchasing company. All the old claims under matured life policies have been discharged by the association.

Cur. adv. vult.

(1) Sect. 7 of the Life Assurance Companies Act, 1872: "Where a company, either before or after the passing of this Act, has transferred its business to or been amalgamated with another company, no policy holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy shall by reason of any such payment made after the passing of this Act, or by reason of any other act done after the passing of this Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company, on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorised."

(2) [1909] 1 Ch. 80.

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LIFE AND HEALTH ASSURANCE ASSOCIATION, LIMITED, *In re.*

Feb. 9. EVE J. On February 7, 1898, the Life and Health Assurance Association, Limited, was incorporated under the Companies Acts with the object, amongst other things, of carrying on the business of life assurance in all its branches. The registered office of the association is situate in Scotland. On March 1, 1898, the association made the deposit of 20,000*l.* required by s. 3 of the Life Assurance Companies Act, 1870, and the same is now represented by two sums of Consols and India 3½ per cent. stock, standing to the credit of an account entitled "Ex parte the Life and Health Assurance Association, Limited."

The life assurance fund accumulated by the association out of premiums has never amounted to any sum approaching 40,000*l.*

On May 14, 1909, an extraordinary resolution was passed for the voluntary winding-up of the association, on the ground of its being unable, by reason of its liabilities, to continue its business. By an order of the Court of Session (First Division) in Edinburgh, dated June 2, 1909, the voluntary winding-up was directed to be continued, subject to the supervision of the Court.

In the month of July, 1909, pursuant to a special resolution passed and confirmed at extraordinary general meetings of the association held on May 14 and June 2, 1909, the liquidators entered into a provisional agreement for the transfer of the life assurance business of the association to the General Accident, Fire, and Life Assurance Corporation, Limited.

The purchasing company is also domiciled in Scotland. It was incorporated under the Companies Acts in February, 1891, has made the statutory deposit, and, in addition, has accumulated out of premiums a life assurance fund of 42,000*l.* and upwards. In September last its current life assurance contracts were 1825 in number, assuring sums amounting to 560,000*l.*

By the provisional agreement of transfer all life assurance contracts of the association current on May 10, 1909, were to be transferred to and taken over by the purchasing company, the purchasers undertaking all obligations thereunder, and being entitled to all premiums payable in respect thereof, as from that day, and further agreeing to pay 1000*l.* for the goodwill attaching to the business thus acquired. On the other hand, the vendors were to remain liable for all outstanding claims which had arisen

under life assurance contracts prior to May 10, and bound themselves, if the proposed transfer was sanctioned by the Court, to join in an application to this Court for payment to the purchasers of the sum of 5500*l.*, with interest thereon at 3½ per cent. from May 10, out of the statutory deposit made by the vendors on the formation of the association.

The sum of 5500*l.* was arrived at in this manner. On May 10 the outstanding life assurance contracts of the association were 262 in number, assuring an aggregate sum of 38,691*l.* 10*s.* The present value of these policies estimated in the manner prescribed by s. 5 of the Life Assurance Companies Act, 1872, but on a basis more favourable to the assured, both as regards expectation of life and assumed rate of interest, than that provided in the First Schedule to the Act, was fixed at 5500*l.*, and accordingly it was made part of the bargain that the purchasers should have assigned to them so much of the deposit as would have represented the interest of the transferred policy-holders therein, had the association been wound up without any transfer being made.

On September 27, 1909, the transfer was confirmed by the Scotch Court under s. 14 of the Act of 1870, and on October 13 the 1000*l.* was paid and the assignment completed.

By the petition now before me, which is entitled in the matter of the association and in the matter of the Life Assurance Companies Acts, 1870 to 1872, the association and its liquidators, and the purchasing company, pray that the Consols and India 3½ per cent. stock now representing the deposit may be sold, and that out of the money to arise from such sale 5500*l.*, with interest thereon at the rate of 3½ per cent. per annum from May 10, 1909, may be paid to the purchasing company, and that the balance may be paid to the liquidators of the association.

The evidence in support of the petition proves the foregoing facts, and further that all claims which matured under life assurance contracts prior to May 10 have been paid and discharged by the association, and that many of the policy-holders have paid their renewal premiums to the purchasing company.

In these circumstances it is urged that inasmuch as the purchasing company will, if an order be made on the petition,

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receive out of the deposit the full sum which the transferred policy-holders would have been entitled to receive thereout in the liquidation of the association, the Court ought not to retain the deposit or any part thereof; or, putting it in another way, it is argued that the excess of the deposit over and above the sum necessary to satisfy the claims of the policy-holders in the liquidation constitutes an asset of the association available for the payment of its debts and the discharge of its liabilities on contracts other than life assurance contracts, and ought now to be paid to the liquidators to be so applied.

However convincing these contentions might have been had the liquidation of the association proceeded on other lines—that is to say, on the lines of determining the contracts with the assured and paying them the values of their several policies—I cannot regard them as in any way apposite to the condition of things which has been brought about by the transfer of the contracts to the purchasing company.

In truth and in fact there has been no liquidation properly so called in regard to the current policies. There has been a transfer of the business, and a transfer, I may add, under s. 14 of the Act of 1870, for I think it is hopeless to contend that that section does not apply to a transfer made by a company in liquidation exactly as it applies to a transfer made by a company as a going concern. This being the true nature of the transaction, what is there, apart altogether from any statutory protection for the policy-holders such as is to be found in s. 7 of the Act of 1872, which entitles the insurers, in the absence of a release, or of novation on the part of the assured, to take to themselves any part of the fund which, by the contract of assurance, is appropriated as a security for the policy-holder? The association could not, by transferring the contracts, relieve itself of its liability thereunder, and, on general principles, I should have been prepared to hold that no part of the deposit could be paid to the association until the Court was satisfied that each and all of the assured had released the association from liability, and thereby abandoned their contractual right to have the deposit retained to answer the claims under the policies.

But the Legislature has not been content to leave the matter to be dealt with on general principles alone. Foreseeing that endless disputes might arise upon the question whether in fact the assured by conduct had released the transferring company, Parliament, by s. 7 of the Act of 1872, expressly enacted that, where a company has transferred its business to another company, no policy-holder in the first-mentioned company who shall pay to the other company the premium accruing due in respect of his policy shall, by reason of any such payment, or by reason of any other act, be deemed to have abandoned any claim which he would have had against the first-mentioned company, on due payments of premiums to such company, or to have accepted, in lieu thereof, the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized.

No such abandonment and acceptance by the policy-holders of the association are suggested, and accordingly they still retain their full rights against the association and the deposit, and I have no power to order any portion of it to be paid to the association or their assignees, the purchasing company. In so deciding I am adopting in part the reasoning underlying the decision in *Ex parte Scottish Economic Life Assurance Society* (1) and in no way whatever differing from the judgment in *In re Popular Life Assurance Co.* (2) or the reasons supporting it.

I will allow the petition to stand over generally, with liberty to amend.

Solicitors: *Andrews, Fawcus, Ogilvie & Fisher.*

(1) 45 Ch. D. 220. (2) [1909] 1 Ch. 80.

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PERRY *v.* NATIONAL PROVINCIAL BANK OF ENGLAND.

[1909 P. 1342.]

Principal and Surety—Novation—Release of Principal Debtor—Discharge of Surety.

In 1903 P. as surety executed mortgages of certain property of his own to a bank to secure the overdraft of P. Brothers, a firm in which he was not a partner. The mortgage deeds all contained a provision that the bank should be at liberty without affecting their rights under the mortgages (among other things) "to vary exchange or release any other securities held or to be held by the bank for or on account of the moneys thereby secured or any part thereof" . . . . "and to compound with, give time for payment of, and accept compositions from and make any arrangements with the debtors or any of them."

In 1908 P. Brothers, being insolvent, called their creditors together, and a scheme was arranged whereby a company was formed who should take over certain properties of the firm for realization and should issue debentures to the creditors at the rate of 25*s.* for each 1*l.* of their debts in full discharge thereof. The bank in accordance with this scheme applied for debenture stock on a form which contained an express agreement by the applicants to accept such debenture stock in full discharge of all their claims against P. Brothers. The amount of the debt in respect of which debenture stock was to be issued was 1900*l.* This amount was arrived at by deducting from the total debt due to the bank 1630*l.*, the value put upon securities held by them on the property of the firm; but no deduction was made on account of P.'s mortgages. The interest on the debenture stock not having been paid, the bank threatened to sell the property comprised in P.'s mortgages. In an action by P. for reconveyance of the mortgaged property on the footing that nothing was due on the mortgage :—

Held, varying the decision of Neville J., that as to the 1900*l.* the debt was completely discharged and therefore the surety's property was released; but that as to the 1630*l.* the debt remained unpaid, although the principal debtor was released; consequently that by the express terms of the mortgage deeds the surety's property continued liable.

Cowper v. *Smith*, (1838) 4 M. & W. 519, and *Union Bank of Manchester* v. *Beech*, (1865) 3 H. & C. 672, followed.

Commercial Bank of Tasmania v. *Jones*, [1893] A. C. 313, distinguished.

By four several mortgages, three of which were dated October 21, 1903, and the fourth November 1, 1906, all made between the plaintiff of the one part and the defendant bank of the other part, the plaintiff mortgaged certain freehold and leasehold hereditaments to secure the repayment of all moneys

which from time to time might be due to the bank from his two sons, who were carrying on the business of builders and contractors in partnership under the name of Perry Brothers. The mortgages were all in the same form, with such variations as were necessary between leaseholds and freeholds. The proviso for redemption was as follows: "If the mortgagor shall on demand pay to the bank all such sums of money as now are or shall from time to time become due or owing to the bank anywhere upon banking account or upon any demand or other account or any other matter or thing whatsoever including interest demands commission and all other banking charges from or by H. W. Perry and C. S. Perry or any or either of them or any or either of their executors or administrators as members of the firm of Perry Brothers or from or by the person or persons for the time being carrying on business in the name of the firm (all of whom are hereinafter comprised in the term 'the debtors') whether such sums of money shall be due or owing from the debtors or any of them either solely or jointly with any other or others in partnership or otherwise the bank will at the request costs and charges of the mortgagor reconvey (or surrender) the said hereditaments and premises to him or as he shall direct"; and the mortgage deeds contained the following declaration: "That the bank shall be at liberty without thereby affecting their rights herein at any time to determine or vary any credit to the debtors or any of them to vary exchange or release any other securities held or to be held by the bank for or on account of the moneys hereby secured or any part thereof to renew bills or promissory notes in any manner and to compound with give time for payment of and accept compositions from and make any other arrangements with the debtors or any of them or other obligants on bills notes or other securities held or to be held by the bank for or on behalf of the debtors or any of them. And it is hereby agreed and declared that this is to be a continuing security for the whole amount now due or which may hereafter from time to time become due to the bank by the debtors or any of them and that in case of bankruptcy liquidation by arrangement or composition with creditors any dividends that the bank may receive from the estate or estates of the debtors or any of them

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or others shall not prejudice the right of the bank to obtain payment by means of this security of any sum which after receipt of such dividends may remain owing to them by the debtors or any of them."

In 1908 the firm of Perry Brothers were in serious difficulties, several bankruptcy petitions being pending against them. A meeting of creditors was held at which a committee was appointed, which reported to a subsequent meeting held on July 23, 1908, recommending that a company should be formed with a nominal capital of 5000*l.* for the purpose of acquiring the whole of Messrs. Perry's properties, the shares to be issued to Messrs. Perry in payment of the purchase price of the properties, but to be issued only as and when the debentures thereinafter mentioned should be paid off; and that debenture stock should be forthwith issued to the creditors in satisfaction of the debts due to them at the rate of 25*s.* of stock for every 1*l.* of debt due to them.

This scheme was accepted by the creditors, including the bank, and a company called "The Finsbury and General Properties, Limited," was formed to carry it out. The properties taken over were completed buildings belonging to the firm. All uncompleted contracts were taken over by another company formed for the purpose. There was some correspondence between this company and the bank as to the value to be put on securities held by the bank on property belonging to Perry Brothers, and on November 10, 1908, the bank sent in a request upon a form supplied by the company which was in the following terms:—

"Please allot to me debenture stock to the value of 2375*l.* being the amount of my claim against Messrs. Perry Brothers with an addition thereto of 25 per cent. I agree to accept such debenture stock in full discharge of all my claim against Messrs. Perry Brothers.

Total debt with interest to 30.9.03 ...	£3530	0 0
Less value of securities	1630	0 0
	1900	0 0"

The securities the value of which was disputed were those held upon the property of the firm of Perry Brothers. The

mortgages given by S. Perry were never mentioned in the discussion as to value. It was plain from the letters which passed between the head office of the bank and the manager of the branch in which Perry Brothers' account had been kept that the bank officials always supposed that S. Perry's mortgages were not affected by the arrangement. The company did not succeed in realizing enough property to meet the interest on the debentures as it became due, and the securities valued at 1630*l.* were not expected to realize that sum. Accordingly in 1909 the bank pressed S. Perry for payment and threatened to sell the property comprised in his mortgages.

This action was commenced on July 12, 1909, by S. Perry against the bank for a declaration that nothing was due on the mortgages, an injunction to restrain the sale, and for reconveyance.

The action was heard before Neville J. on December 13, 1909.

C. J. Mathew, for the plaintiff. The acceptance of a new debtor in the place of the old, and release of the old debtor, is a complete novation and discharges the surety as well as the principal. The law is clearly stated in the judgment of the Privy Council in *Commercial Bank of Tasmania* v. *Jones*. (1) The only exception is where language importing an absolute release is construed as a covenant not to sue. That cannot apply where a new debtor is substituted.

Jenkins, K.C., and *E. Beaumont*, for the defendants. It is not contended that the release here can be construed as a covenant not to sue. But there are two other cases in which a release of the principal debtor does not release the surety—(1.) where it is so provided in the release with the consent of the surety; (2.) where it is so provided in the contract creating the suretyship. The provision in the mortgage deeds that the bank may compound or enter into any arrangement with the debtors prevents a release operating to release the surety. *Cowper* v. *Smith* (2) and *Union Bank of Manchester* v. *Beech* (3) are clear decisions of the Court of Exchequer to that effect. The point does not appear to have been taken in the case before the Privy

(1) [1893] A. C. 313. (2) 4 M. & W. 519.
(3) 3 H. & C. 672.

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Council. Perhaps it was not open by reason of something which had happened earlier in the case. The Exchequer cases were not cited, and the Judicial Committee of the Privy Council had no power to overrule them.

NEVILLE J. I think the two cases which have been cited to me from the Exchequer Reports are distinguishable from the present case. They both appear to me to be to the same effect, namely, that where you have a contract in the agreement of suretyship that the creditor may make a composition with the debtor, then the effect of such a composition is that although it may release the debtor, as between himself and the creditor, from his debt altogether, the right against the surety is still retained. But it seems to me that the other case which was cited, a decision of the Privy Council, is to a different effect, namely, that you cannot preserve the right against the surety in a case where the debt is gone.

The question I have to consider here is, Has there been a release of the debt under circumstances which involve a retention of the liability of the surety, or is the debt gone? It seems to me that if the debt is gone, then there can be no right of the bank to sue the surety, and the security that is given must, as the result of the transaction, be exhausted.

Now here, the debtors being apparently on the verge of bankruptcy, an arrangement was entered into whereby a new company was formed to purchase the assets of the old firm, and that new company agreed to give and the creditors agreed to accept a certain amount of debenture stock in satisfaction of their debt. Here it is to be observed it is not the case of a creditor's composition under a creditor's deed as in the case of *Cowper* v. *Smith* (1) and *Union Bank of Manchester* v. *Beech*. (2) Here you have a new debtor who is responsible to the creditor for the amount of the old firm's debt, and it seems to me that the acceptance by the creditor of the debenture stock issued by the new debtor in full discharge of the old debt does in fact put an end to that debt, and so prevents the creditor from suing the surety. That seems to me to be the precise point in the decision

(1) 4 M. & W. 519. (2) 3 H. & C. 672.

of *Commercial Bank of Tasmania* v. *Jones* (1), which I am unable to distinguish from the present case, and to distinguish it from the other cases that have been cited. I think the plaintiff is right, and that the bank should deliver up the deeds, and must pay the costs of the action.

The delivery up of the mortgage deeds was stayed pending an appeal, the defendants undertaking to set down the appeal at once, and in case of an unsuccessful appeal to make good any damage caused by the retention of the deeds.

J. R. B.

C. A.

The defendants appealed. The appeal came on for hearing on January 19, 1910.

Jenkins, K.C., and *E. Beaumont*, for the defendants. The whole point is whether on the true construction of the mortgage deed and in the circumstances which have happened the surety is released. The clause in the mortgage deed gives power to the defendants to vary the securities and make any composition or arrangement with the principal debtor without affecting their rights under the deed. What was done was in substance a composition, and certainly it comes within the term "arrangement." *Cowper* v. *Smith* (2) and *Union Bank of Manchester* v. *Beech* (3) are clear authorities that a provision in the original contract of suretyship that the creditor may release the principal without losing his right against the surety is good at law.

Commercial Bank of Tasmania v. *Jones* (1), by which Neville J. considered himself bound, is a wholly different case. There Bonney guaranteed the payment to the bank of debts due from Wakeham by a document containing a clause very like the clause in this mortgage deed. Wakeham mortgaged certain property to the bank by way of security for the advances to him. Subsequently he transferred his business and the mortgaged properties to Marshall. The bank agreed to take Marshall as their debtor in place of Wakeham and reconveyed the mortgaged

(1) [1893] A. C. 313. (2) 4 M. & W. 519.
(3) 3 H. & C. 672.

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properties to Wakeham free of the debt. Wakeham conveyed the property to Marshall, who then executed fresh mortgages to the bank to secure the sum due from Wakeham and any further sums which might become due from Marshall. Bonney agreed to give a fresh guarantee for Marshall's debt, but died without doing so. The bank sued his executors and failed. It was clearly a wholly fresh transaction between the bank and Marshall. It was not merely a release of the principal debtor, but a release of the old debt and creation of a new one. The point as to the contract contained in the original guarantee was never taken, and the case was argued upon the difference between a release and a covenant not to sue. We need not argue that point in this case, where it is a mere question of the contract. The debt here remains the same though we have lost our personal remedy against the debtor, as is always the case in an arrangement or composition. What has been done is merely a way of carrying out a deed of arrangement.

Hughes, K.C., and *C. J. Mathew* were only called upon as to the 1630*l.* at which the bank valued their securities on the property of Perry Brothers. The guarantee was for the moneys due from Perry Brothers. We ask what moneys are so due and the answer is none. As soon as the arrangement was made the debt was gone and the guarantee went with it. The transaction meant that the whole debt should be discharged for every purpose. The basis of the scheme was to set free Perry Brothers. The debt was discharged to the extent of the 1900*l.* by the issue of the debenture stock and to the extent of the 1630*l.* by taking over the securities in satisfaction. In some cases the release of the debtor is construed as merely a covenant not to sue: *Nevill's Case* (1); but the extinguishment or discharge of the debt puts an end to the suretyship whether any rights are reserved against the surety or not, because if the debt is gone the suretyship is gone: *Commercial Bank of Tasmania* v. *Jones*. (2) A composition operates as a release of the debtor, but is not necessarily a discharge of the debt, and unless *Cowper* v. *Smith* (3) and *Union Bank of Manchester* v. *Beech* (4) are distinguishable from

(1) (1870) L. R. 6 Ch. 43, 47.
(2) [1893] A. C. 313.
(3) 4 M. & W. 519.
(4) 3 H. & C. 672.

the present case on that principle they are inconsistent with *Commercial Bank of Tasmania* v. *Jones* (1) and ought to be overruled.

No reply was called for.

COZENS-HARDY M.R. This is a curious case arising out of the law of principal and surety. It is important to distinguish clearly between the rights of a surety under an ordinary contract of suretyship not containing any special provisions and the rights of a surety where the instrument creating the suretyship contains certain special clauses. It is elementary law that in a simple case of principal and surety the surety is discharged if the creditor gives time to the principal or does certain other acts; and, a fortiori, if the creditor releases the principal debtor, of course the surety is released too. There are a certain number of acts which will not release the surety if, when the act in question is done, there is a reservation of rights against the surety. A common instance of this is giving time. When you find in the instrument of suretyship itself a provision that the surety shall be liable notwithstanding certain acts being done by the creditor which would otherwise release him, these doctrines have no application at all. It is not then a simple contract of suretyship. It is true that in one sense it is a contract of suretyship, but it is a contract of suretyship containing special clauses which deliberately exclude certain rights which the surety would otherwise have had. Before I read the instrument in question in this case I may observe that it is a very peculiar document. It is a document in which there is no covenant to pay the debt; it is a document in which the surety's property is made available to the creditor. The plaintiff conveys certain property to the defendant bank for the purpose of securing the account of certain customers of the bank, Messrs. Perry Brothers. There is no covenant to pay the debt, and in the last clause but one there is this: [His Lordship then read the agreement and declaration giving the bank liberty to do various things, including to compound and make arrangements with the debtor.]

Pausing there, these acts, whatever they are, are acts which

(1) [1893] A. C. 313.

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the surety contracts that the bank may do without affecting their rights under this instrument. What happened was this. Perry Brothers got into hopeless difficulties; we were told that there were sixteen petitions in bankruptcy against them. A scheme was suggested that what is sometimes called a realization company should be formed in order that the company should realize all the assets and that the creditors should take debentures in the new company for a certain amount in discharge of the sums owing to them. The bank did this. At the critical date they had a debt of 3530*l.* They had certain securities mentioned in the schedule of mortgages, which they valued at 1630*l.* That left 1900*l.* as an unsecured debt. The arrangement made after the company had been formed and after it had taken a conveyance of the equity of redemption in the mortgaged property was that the bank should receive debentures to the nominal amount of their unsecured debt with a bonus of 25 per cent. [His Lordship read the application for debentures.]

The first point which arises is this. The plaintiff, the surety, says that the debt is released. "You, the bank," he says, "have no claim upon my property. You, the bank, therefore, must hand over my deeds to me because there is no longer any liability on me as surety." Neville J. has accepted that view, and the bank appeal here. In my opinion there are here two perfectly distinct and independent points. It seems to me plain that by this transaction, under which the bank accepted these debentures and 25 per cent. bonus in accord and satisfaction of 1900*l.*, part of the debt, that part of the debt was gone just as much as if it had been paid in sovereigns to the bank, and that in no point of view can the bank be entitled to claim against the surety any part of that 1900*l.* That, however, does not deal with the whole of the matter. It leaves 1630*l.*, as to which questions of difficulty and importance arise. What was the position of the bank with respect to that 1630*l.*? It is quite plain to my mind that they were mortgagees, and only mortgagees, in respect of the property which they valued at 1630*l.* It is quite plain that the equity of redemption in that mortgaged property did not remain in Perry Brothers, but passed to the company, and I see no ground whatever for holding that that which

was once a mortgage has become by any transaction proved before us anything else than a mortgage. The position is this: 1630*l.*, part of the original debt due on Perry Brothers' account, is still unpaid, and for that balance there is a security held by the bank. That gives rise to the important point which has been argued before us. It is said, "Even if that be so, still there can be no right as against the surety, because by reason of this arrangement with Perry Brothers you have released Perry Brothers, and there can be no suretyship after the release of the principal debtor." But I think the answer to that is that it is perfectly possible for a surety to contract with a creditor in the suretyship instrument that notwithstanding any composition, release, or arrangement the surety shall remain liable although the principal does not.

The first and the leading case upon this point is *Cowper* v. *Smith* (1), in the Court of Exchequer, in which it may be there was no formal release, but at least there was this: A guarantee was given by the defendant to the plaintiffs for goods to be supplied by them to one Thomas Green to the extent of 400*l.*, and the guarantee provided that the plaintiffs should have full liberty to extend the period of credit to Green, and to hold over or renew bills, notes, or other securities given by him; and to grant to Green, and the persons liable upon such bills, notes, or securities, any indulgence, and to compound with him or them respectively, as the plaintiffs might think fit, without the same discharging or in any manner affecting the liability of the defendant by virtue of the guarantee. Then it appears that a composition deed was executed between the principal debtor and his creditors, to which composition deed the plaintiffs were parties, and the question was whether the effect of that was to discharge the surety. Lord Abinger in the course of the argument says, "By the express terms of the contract in this case, you agree to become bound notwithstanding the discharge of the principal debtor"; and Gurney B. says, in answer to an argument that the composition deed ought to have reserved the right to sue the surety, "The terms of the guarantee confer a right to release absolutely, and you insist upon a condition being imported into it." Lord

(1) 4 M. & W. 519, 520, 521.

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Abinger in delivering judgment said: "The deed in question is a composition deed, and is therefore within the express terms of the guarantee, which authorizes the plaintiffs to 'compound with' their debtor. Accordingly, as the surety has *expressly* contracted to remain liable, notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal is an implied discharge of the surety."

It may be said that there was there no formal distinct release in terms. It may be said that this may be construed merely as a covenant not to sue, although there is not a word in the judgment to give colour to that suggestion; but in the next case, *Union Bank of Manchester* v. *Beech* (1), where there was a similar clause to that which I have read in the suretyship deed, there was a composition deed which in terms contained a plain and absolute release of the principal debtor by the plaintiffs from the balance due to them on his banking account and all claims and demands in respect thereof. Pollock C.B. there says: "The case of *Cowper* v. *Smith* (2) is an authority that a composition with the principal debtor is not a discharge of the surety where he has expressly agreed to continue liable. The only distinction between that case and the present is, that here there is an absolute release; there, although there was not in terms a release, there was what substantially amounted to the same thing. Under a composition, a part is taken in satisfaction of the whole. Money accepted as part of a debt is not a composition, but a part payment. Where there is a release, the creditor in effect says to the debtor 'I release you from your debt'; whereas, if there is a composition only, the creditor in effect says, 'I agree to accept a portion of your debt in satisfaction and discharge of the whole.' The difference, however, is merely technical, and in substance they are the same thing." Bramwell B. gave judgment to the same effect, pointing out that in that case, as here, the surety had expressly contracted that the composition or arrangement with the principal debtor should not release him.

In these circumstances I cannot agree with Mr. Hughes in his able argument that there was any obligation whatever upon the bank in accepting this arrangement to reserve any rights against

(1) 3 H. & C. 672, 676. (2) 4 M. & W. 519.

the surety. The surety had himself contracted that the rights under the deed should not be affected by any such arrangement; and, that being so, it seems to me that though there is no personal liability on the part of Perry Brothers to the bank, yet as regards this 1630*l.* this is part of the liability of Perry Brothers secured by the mortgage and is within the meaning of the deed something for which the surety is still liable to the bank notwithstanding the release of the debtor. For these reasons, with great respect to Neville J., I think that his order must be varied, in substance, by declaring that the plaintiff is entitled to have back his deeds only upon payment to the bank of so much of 1630*l.* as has not been discharged by the realization of the securities held by the bank on the property of the firm.

FLETCHER MOULTON L.J. I agree entirely with the judgment which has just been given. I only wish to add a few words with reference to the case which Neville J. treated as absolutely governing the decision in this case. On reading the facts of the case of *Commercial Bank of Tasmania* v. *Jones* (1), it seems strange that the bank should in that case have been bold enough to bring an action against the surety, because stronger facts in favour of the surety having been released I cannot imagine. It seems to me probable that the action was based on the existence of a verbal promise of the surety that he would guarantee the new balance of account of the substituted person and that his guarantee in respect of the original debt should remain in force until he had done so. He died, however, in the meantime, and in law that promise was not adequate to support the claim of the bank. What the bank had done appears to me to be equivalent to accepting payment for the whole amount. They had entered into an arrangement whereby they first handed back to the principal debtor the whole of the securities they had for the debt. Then they made an arrangement with Marshall that they should take Marshall as their debtor in room and stead of Wakeham. Wakeham then conveyed the properties to Marshall, and Marshall mortgaged them to the bank for his own banking account, including, as the first item to the debit of that banking account,

(1) [1893] A. C. 313, 316.

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the former debt of Wakeham. As Lord Morris, in giving the judgment of the Judicial Committee, says in what appears to me to be the relevant sentence of the judgment, "In this case, the acceptance of Marshall as full debtor, in room and stead of Wakeham, which constituted a complete novation of the debt, necessarily operated as an absolute release of Wakeham, and it is therefore in vain to contend that such novation merely amounted to a covenant not to sue the debtor for whom the respondent was surety." The bank had done sufficient to shew that they accepted payment of the debt from Wakeham by the new indebtedness of Marshall and had handed over to Wakeham the whole of the securities to be conveyed to Marshall for the purpose of their being part of the security for the new banking account. The passage of the judgment on which Neville J. relies deals with the question of the effect of the contract of suretyship. I confess I do not quite understand the language that is used. If it means that in an ordinary contract of pure suretyship the consequences enumerated follow, it is only a statement of obvious and uncontested law, and this accounts for the learned Lord speaking of it as being settled law. If the meaning is that it is impossible to make a legal contract which would have certain legal effects we cannot accept such law. It would be in conflict with the law laid down by the Court of Exchequer in the two cases to which the Master of the Rolls has referred and which were not cited in the case before the Privy Council. Moreover it would be quite meaningless. People can contract to do anything. All that it would amount to would be that if it was a contract which had those legal consequences it could not properly be called a contract of suretyship. But I can see, I think, that the reason that the language is used by Lord Morris in that case is that counsel on behalf of the bank had failed to persuade their Lordships that the acts done by the bank came within the special clauses of the agreement of suretyship, and, when you read them carefully, it appears clear that they did not come within those special clauses—certainly not if interpreted in a reasonable way. The consequence is that the learned Lord was entitled to treat the case as an instance of the normal contract of suretyship, and his words, therefore, refer to the doctrines of

law with regard to a normal contract of suretyship, and, as so interpreted, they enunciate what is well settled law. In my opinion, therefore, that case has no bearing whatever on the present case.

BUCKLEY L.J. In this action the mortgagor asks for judgment for reconveyance of the mortgaged property on the footing that there is nothing due on the security. The plaintiff in his pleadings has not offered to redeem in case there is anything due on the security. That is a matter we shall have to consider presently when we come to consider how the costs of the action are to be dealt with. As regards the 1900*l.*, if the appellants' arguments were right, it would result that by virtue of words such as those in this deed the surety, or the property mortgaged by the surety, would remain liable, even though the principal debtor had paid the debt. That to my mind is an absolutely impossible contention. If the debt is paid there is nothing for which the surety, or the property mortgaged by the surety, can be liable. As to the balance of 1630*l.* it is necessary to discriminate between two classes of cases. The first is where the whole debt is paid or satisfied. In such a case as above stated the surety or his property is not liable. There is nothing to be liable for. There is no debt, and therefore all liability ceases. That is the case of *Commercial Bank of Tasmania* v. *Jones* (1), a decision which rested on this, that as regards the debtor there was no debt left; it had been paid by somebody else taking over the liability. The other class of case is where part of the debt is paid and the balance remains unpaid, but such events have taken place as that for such balance the principal debtor cannot be rendered liable by the creditor. In that case there is a debt remaining, and this difficulty may arise, that if the creditor remains entitled to call and does call on the surety the surety will be entitled to sue the principal debtor, and therefore the debtor will not have been released altogether. If the instrument by which the surety accepts liability contains apt words to deal with that class of case the surety may remain liable although the principal debtor has been discharged by the creditor. In this

(1) [1893] A. C. 313.

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second class of case you must look at the instrument by which the surety has become bound and see what is its effect, because if it is so expressed that the surety is to remain liable he does remain liable, and as between himself and the creditor the surety of course cannot complain. Two instances of that class of case are *Cowper* v. *Smith* (1) and *Union Bank of Manchester* v. *Beech*. (2) The effect of those cases is that where the whole debt has not been discharged, but the debt as to part remains undischarged, but the principal debtor cannot be pursued by the creditor for the balance, the surety may by apt words be left liable although the principal debtor has as regards such balance been released as between himself and the creditor. I must, therefore, look at this instrument to see whether the words are apt for that purpose. [His Lordship read the material clauses in the instrument, and continued.] There is there an agreement and declaration that the bank shall be at liberty to do certain things, including to compound with the debtor without forfeiting their rights under the instrument. The effect, I apprehend, is this. The surety mortgages his property to secure the principal debt, and the bank may, if they please, compound with Perry Brothers, by which I understand that they may accept from Perry Brothers a sum less than the full amount of the debt upon the terms that they shall not sue Perry Brothers for the balance, and this deed provides that that may be done without affecting the bank's right against the surety. The substance of the transaction here was that as between the creditor and the principal debtor the creditor received payment by accord and satisfaction of 1900*l.*, part of the debt. He did not receive payment of 1630*l.*, the balance of the debt, but he released the debtor therefrom. As to the 1630*l.* he compounded with the debtor, but that was not to affect his rights against the surety. That left the creditor in a position to say to the surety who had mortgaged his property to secure the debt, "My right as between you and me to get out of your property this 1630*l.* remains unaffected." Here, as it seems to me, I have apt words to shew that this arrangement which took place as between the creditor and the principal debtor was to leave the surety exposed to the

(1) 4 M. & W. 519. (2) 3 H. & C. 672.

consequences to which he would have been exposed if there had been no such arrangement. The two cases of *Cowper* v. *Smith* (1) and *Union Bank of Manchester* v. *Beech* (2) seem to me to be perfectly consistent with *Commercial Bank of Tasmania* v. *Jones*. (3) They were dealing with a different state of facts and are perfectly good law. The state of facts here is similar to the facts existing in the two cases in the Court of Exchequer. I think there is here reserved a right against the property of the mortgagor surety for such balance of the debt as has not been paid by the debtor by accord and satisfaction.

The surety having elected to redeem, an order for redemption was made on the above footing; the costs of the action to be added to the defendants' security; no costs of the appeal.

Solicitors: *Francis Miller & Steele; Wilde, Moore, Wigston & Co.*

(1) 4 M. & W. 519. (2) 3 H. & C. 672.
(3) [1893] A. C. 313.

H. B. H.

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COX *v.* HARPER.

[1909 C. 725.]

Landlord and Tenant—Execution—Judgment Creditor—Arrears of Rent—"Landlord"—"Rent"—Landlord and Tenant Act, 1709 (8 *Anne c.* 18), *s.* 1.

In 1896 a brewery company who were lessees of a public-house granted an underlease of the same to I., who mortgaged his interest to the plaintiff and gave a second mortgage to the company. In 1901 I. became bankrupt, and the defendant was appointed his trustee in bankruptcy. In 1902 the company went into possession as second mortgagees and let the public-house to a tenant who agreed to pay a rent of 150*l.* a year for the premises and an additional yearly sum of 1250*l.* in lieu of premium for goodwill. On March 8, 1909, the company obtained judgment against their tenant for 960*l.* and gave him a month's notice to determine his tenancy. On March 9, 1909, before the tenancy expired, the plaintiff commenced a foreclosure action against the defendant and the company, and on March 12 a receiver and manager was appointed, to whom the company was directed to give up possession. Later on the same day the sheriff levied execution in respect of the company's judgment debt:—

Held by Joyce J., that the receiver was "landlord" of the premises within the meaning of s. 1 of the Landlord and Tenant Act, 1709, and as such was entitled to be paid by the execution creditor one year's arrears of the rent; and *held* by Joyce J. and the Court of Appeal, that the rent comprised the 150*l.* only, the 1250*l.* not being rent within the meaning of the statute.

Adjourned Summons.

By an indenture of underlease dated September 24, 1896, Barclay, Perkins & Co., Limited, demised a public-house called the Ranelagh Arms, Roman Road, Bow, to L. W. S. Innocent for a term of forty years from September 29, 1896, at a rent of 350*l.* reducible to 150*l.* upon the lessee trading with the company for all malt liquors, and the lease contained the usual covenants of a "tied" lease. The lease was expressed to be granted in consideration of a premium of 41,000*l.*

By an indenture also dated September 24, 1896, Innocent mortgaged his term to the plaintiff Cox to secure the sum of 20,000*l.* and interest. The mortgage provided that the power of leasing given by the Conveyancing Act, 1881, should not be

exercisable by the mortgagor or any person deriving title under him. By another indenture executed on the same day Innocent mortgaged the term by way of second mortgage to the company to secure the sum of 18,000*l.* and interest.

On August 26, 1901, Innocent was adjudicated bankrupt, and the defendant Harper was appointed trustee in his bankruptcy. He subsequently sold the tenant's fixtures and stock in trade to the company, disclaimed all interest in the lease, and was dismissed from the action. By arrangement with Cox the company then entered into possession as second mortgagees and on May 29, 1902, let the Ranelagh Arms together with the fixtures thereto belonging to L. W. Innocent (the son of the bankrupt) upon a yearly tenancy at "the rent of 150*l.* a year for the said premises, and the additional yearly sum of 1250*l.* in lieu of premium for the goodwill of the business and for the use of the fixtures and fittings upon the premises, such several rents or yearly sums to be paid weekly." By the agreement a power of re-entry was reserved to the company "in case the rents hereby reserved or any part thereof shall at any time hereafter be in arrear and unpaid for the space of fourteen days." By a subsequent memorandum the tenancy was to be determinable upon one month's notice in writing on either side.

On February 19, 1909, the company gave the tenant notice to determine his tenancy on March 19.

On March 8, 1909, the company obtained judgment in the King's Bench Division against the tenant for a sum of 960*l.* owing by him to them.

On March 9, 1909, foreclosure proceedings were commenced by Cox as first mortgagee against Harper and the company, and on March 12, 1909, a receiver and manager of the Ranelagh Arms was appointed. The order appointing the receiver did not direct the tenant to attorn to the receiver.

Later on the same day, but before the order appointing the receiver was drawn up, the company levied execution upon the premises in respect of their judgment.

On April 8 the sheriff sold the goods and chattels seized in the execution to the receiver for 700*l.*

On April 15 the sheriff issued an interpleader summons in the

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action in the King's Bench Division, and on May 19 an order on the summons was made by consent directing that the sheriff's costs should be taxed and paid and that the balance of the 700*l.* should be paid to the receiver to abide the determination of the questions raised by the present summons.

This was a summons taken out by Barclay, Perkins & Co., Limited, in the foreclosure proceedings for the determination, inter alia, of the following question:—Whether at the date of the execution the receiver was entitled to be paid any and what arrears of rent as the landlord of the premises within the intent of the Landlord and Tenant Act, 1709, s. 1. (1)

The summons came on for hearing before Joyce J. on November 25, 1909.

Hughes, K.C., and *Sebastian*, for the applicants. The first question is whether the plaintiff Cox or the receiver is the "landlord" of the premises within the meaning of the statute. It will be contended that the first mortgagee by adopting the lease created by the second mortgagees became the landlord. There is a further question as to the amount which is recoverable as rent by the landlord, whoever may be held to be in that position. Before March 12 the applicants were certainly in the position of landlords of the premises, and the execution was levied before the receiver was in possession. Where the execution creditor is himself the landlord the Act does not apply. Unless

(1) Sect. 1 of the Landlord and Tenant Act, 1709, provides as follows: "No goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of this Act."

the plaintiff can shew that at some time before the taking of the goods in execution he was in possession he could not be the landlord within the Act. He never was in possession except by the receiver who was appointed by him in order to avoid the responsibility of going into possession himself.

Then as to the amount of the rent, that is limited to the rent which would be recoverable by distress. The only rent for the premises which could be distrained for was 150*l.* a year. The 1250*l.* is not rent at all, but an additional yearly payment in lieu of premium: *Hancock* v. *Austin* (1); *Selby* v. *Greaves.* (2)

Rent is defined in Co. Litt. 47a. The plaintiff cannot be in a better position than the company, and the company, being themselves the execution creditors, could not take advantage of the statute: *Taylor* v. *Lanyon.* (3)

The receiver is not "landlord" unless the tenant has attorned: *Towerson* v. *Jackson* (4); *Evans* v. *Mathias.* (5)

Norton, K.C., and *Timins*, for the plaintiff. The plaintiff is entitled to the whole of the money in the hands of the receiver. Suppose it had been an outsider who had put in the execution, then Barclay, Perkins & Co. as second mortgagees would have come in with the plaintiff and claimed the rent under the statute. The receiver being the "bailiff" of the "landlords," i.e., the mortgagees as a whole, is entitled to the rent under the statute as against the execution creditor. It is immaterial who is really the "landlord." The statute provides that the execution creditor before removal of the goods seized shall "pay to the landlord or his bailiff" the arrears of rent. The receiver on his appointment became the "bailiff" of the landlords whoever they were. In *Colyer* v. *Speer* (6) the mortgagee of a satisfied term was held to be the landlord. Anybody who can bring ejectment is the landlord within the statute: Foà on Landlord and Tenant, 3rd ed. p. 161.

On March 11 Barclay, Perkins & Co. were the landlords. Upon the appointment of the receiver they were ordered to give

(1) (1863) 14 C. B. (N.S.) 634.
(2) (1868) L. R. 3 C. P. 594.
(3) (1830) 6 Bing. 536; 4 Moo. & P. 316.
(4) [1891] 2 Q. B. 484.
(5) (1857) 7 E. & B. 590.
(6) (1820) 2 Brod. & B. 67; 4 Moo. C. P. 473.

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up everything they had to him as agent for all parties. He thereupon became the landlord. It is said that Innocent never attorned tenant to the receiver, but the object of attornment would be to enable the receiver to act in his own name.

As to the amount of the rent, it is plain upon the agreement of May 29, 1902, that it was 1400*l.* a year. Under the agreement there was a right of re-entry for non-payment of either of the sums of 150*l.* and 1250*l.*

Hughes, K.C., in reply.

Joyce J. This is a case of considerable difficulty and complication. The question arises upon the provision of the 1st section of the Landlord and Tenant Act, 1709, that goods taken in execution are not to be removed from off any messuage, lands, or tenements upon which they may lie or be, unless the party taking them in execution pays the rent due for such messuage, lands, or tenements.

Now, for reasons which I think have sufficiently appeared in the course of the argument—and in fact, as matters stand now, I do not understand any one to dispute it—Barclay, Perkins & Co., the present applicants, were the landlords within the meaning of this section of the Act upon March 11, 1909. On March 12, 1909, an order was made at the instance of Cox, the first mortgagee—Barclay, Perkins & Co. being second mortgagees—appointing a receiver and, among other things, directing that Barclay, Perkins & Co. should give up possession of the mortgaged premises to the receiver. Later in the day, after everybody concerned knew what had been done in reference to the appointment of the receiver, Barclay, Perkins & Co. levied execution on their tenant, not for rent, but in respect of a judgment which they had recovered against him in an action. Now I am of opinion—I may be wrong—that the effect of the order made on the morning of March 12, although of course it took some time before it was drawn up, was, as between the several parties to this controversy, that the receiver really became or was in the position of landlord—that is, the person called the landlord in this section—by virtue of that order, and that he was the landlord at the time of the execution levied.

The receiver being the landlord, or the person represented by him (that is the first mortgagee), through him, being the landlord, at the date of the execution levied, then he is the landlord within the meaning of this section of the Act of 1709, which provides that after a certain date "no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements which are or shall be leased" and so on "shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the execution is sued out shall before the removal of such goods from off the said premises"—meaning the messuage, lands, or tenements upon which the goods lie or be—"pay to the landlord of the said premises or his bailiff"—that is to say in this case the receiver—"all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels."

Now by that curious agreement of May 29, 1902, under which Lewis William Innocent—that is Innocent the younger—became tenant of the public-house which was the subject-matter of the mortgage, and became tenant of Barclay, Perkins & Co., there is clearly a rent of 150*l.* a year reserved in respect of what are called "the premises," and an additional yearly sum of 1250*l.* in respect of other things. It has been contended before me that those two sums are to be treated as one rent, and that consequently 1400*l.* a year is the rent of the messuage, lands, or tenements upon which the goods or chattels lay at the time of the execution. I am of opinion that, looking at the substance and the true construction of this agreement, the rent within the meaning of the Landlord and Tenant Act, 1709, of the premises upon which the goods or chattels lay was 150*l.* a year, and that in ascertaining the rent of the premises on which the chattels lay the additional yearly payment of 1250*l.* a year is not to be taken into account.

G. A. S.

The plaintiff appealed from this judgment on the question of the amount of the rent, and the company gave a cross-notice of appeal against the judgment so far as it decided that the receiver was the landlord at the date of the execution, but in the

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result this cross-notice was abandoned. The appeal was heard on February 4, 1910.

Norton, K.C., and *Timins*, for the appellant. The rent includes the 1250*l.* as well as the 150*l.* The 1250*l.* is paid in lieu of premium for the goodwill, but the question is not in respect of what the money is paid, but of out of what it issues. Anything is a rent which issues out of the demised property, and any demise of property at a yearly sum makes that sum issue out of the demised property. This is analogous to the letting of a furnished house where part of the consideration for the rent is the furniture: *Newman* v. *Anderton* (1), which is followed in *Selby* v. *Greaves*. (2) The word "rents" in the reddendum and the proviso for re-entry shew that both sums were intended to be included as rent.

Hughes, K.C., and *Sebastian*, for the respondents. The statute of Anne speaks of "rent for the said premises," which is precisely how the rent of 150*l.* is described. If one lump sum had been reserved the total amount might have been treated as rent, but where the two sums are severed, and one is described as rent and the other as a yearly sum payable in respect of something which could not of itself be the subject of rent, it is impossible to contend that anything but the 150*l.* is rent: *British Electric Traction Co.* v. *Inland Revenue Commissioners*. (3) If this 1250*l.* is not rent the mere mention of it in other parts of the agreement cannot make it so.

Norton, K.C., in reply.

Cozens-Hardy M.R. In my opinion the judgment of Joyce J. was quite right. The question turns upon the true construction of s. 1 of the statute 8 Anne c. 18 as applied to the agreement of tenancy in this case. Now the section provides, putting it shortly, that the sheriff under an execution is bound to pay to the landlord of any demised premises on which goods are seized, or his bailiff, "all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided

(1) (1806) 2 Bos. & P. N. R. 224. (2) L. R. 3 C. P. 594.
(3) [1902] 1 K. B. 441.

the said arrears of rent do not amount to more than one year's rent." The question here is what is the meaning of rent for the purposes of that section? This tenancy agreement is a peculiar document. It is an agreement for letting a public-house. The rent as between the original lessors and lessee was 150*l*., that is to say, 350*l*. reducible to 150*l*. upon the lessee dealing exclusively with the lessors. The lessee mortgaged his interest and became bankrupt. Then the lessors, the brewers, as second mortgagees entered into possession, and they immediately demised the premises to the son of their old tenant upon a yearly tenancy. The public-house was expressed to be let "at the rent of 150*l*. a year for the said premises." Now be it observed that those words "the rent for the said premises" are the very words used in the statute of Anne. When you find this 150*l*. defined as being the rent for the said premises I cannot see why we should fail to adopt that definition. Then there are these very peculiar words: "and the additional yearly sum"—it is not called rent—"of 1250*l*. in lieu of premium for the goodwill of the business and for the use of the fixtures and fittings upon the premises." There may be a doubt whether the words "in lieu of premium" ought to be enclosed in brackets, but I pass that over. This sum is not described as rent—a circumstance which I agree is not conclusive—but throughout this document it appears to me that a distinction is drawn between the rent of 150*l*. for the said premises and another sum, not called rent, of 1250*l*. which is described as in lieu of premium for the goodwill. No doubt in spite of that description the Court might conclude upon the construction of this document that both these sums were reserved as rent issuing out of the premises. But when I find that a clear distinction is drawn between rent and yearly sum I am not disposed to give to those words any other than their natural meaning. Therefore I think that the landlord had no right to distrain for this additional yearly sum. That in substance is the effect of the reasoning of Joyce J. I think that this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. I do not doubt that two parties can agree upon any amount they

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choose as rent for the premises. I do not doubt that they may agree that the rent shall cover a payment for the use of articles in respect of which of themselves rent could not be reserved. For instance, you could not get rent for the use of furniture of itself, but where you reserve a rent for furnished lodgings it is no objection that the rent for the premises includes the use of the furniture. This is a carefully drawn agreement and the person who drafted it was perfectly well aware of the law as to the reservation of rent. The language of the agreement is explicit. The rent is to be 150*l.* When it comes to the consideration on which the premises are let it states that they are let at the yearly "rent" of 150*l.* The things out of which of themselves rent cannot issue are then spoken of, and a "yearly sum" is to be paid in respect of those. In my opinion the use of the words "rent" and "yearly sum" in the two cases was not accidental but deliberate. It is said that there are places in the agreement where these sums are described indiscriminately as rent and yearly sums. But in my opinion no such references can get over the explicit language in that passage to which I have referred. For these reasons I agree with the Master of the Rolls that this appeal should be dismissed.

Buckley L.J. Where premises on which trade is carried on are the subject-matter of a demise, the lessee is in a different position according as the goodwill is or is not expressed to be included in the demise. If it is not included the lessee cannot prevent the lessor from setting up a rival trade next door. But if there be a demise of the goodwill he may be entitled to prevent his grantor from derogating from his grant and to restrain him from carrying on business in competition with him. If this agreement had stopped at the word "premises" the tenant would have been in the former of these two positions. But the next succeeding words give him a grant of the goodwill. I read this sentence "and the yearly sum of 1250*l.* in lieu of premium for the goodwill of the business" as if the words "in lieu of premium" were enclosed in brackets. Leaving out those words it runs "and the yearly sum of 1250*l.* for the goodwill of the

business." I think that that was a sum reserved for the enjoyment of something other than land, namely, the goodwill. No argument in favour of the appellant can, I think, be founded upon the language used in the power of re-entry. In my opinion the whole question turns on clause 1. The true effect of that, I think, is that the only rent reserved is the 150*l*. For these reasons I think that the order appealed from is right.

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Solicitors: *Marson & Toulmin; Nicholson, Patterson & Freeland.*

H. B. H.

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[1909 P. 1113.]

C. A. 1910 *Feb.* 17.

Practice—Appeal—Time for Appealing—Dismissal of Action as frivolous and vexatious—Interlocutory or Final Order—Rules of the Supreme Court, Order XXV., r. 4; Order LVIII., r. 15.

An order dismissing an action as frivolous and vexatious is for the purposes of appeal an interlocutory order.

Appeal by the plaintiff from an order of Eve J. made upon two motions by the defendants under Order xxv., r. 4, that the statement of claim should be struck out and that the action should be dismissed as against all the defendants as being frivolous and vexatious.

The respondents, the defendants, took the objection that the appeal was out of time.

The appeal was admittedly out of time if the order appealed from was an interlocutory order within the meaning of Order lviii., r. 15, but was not out of time if it was a final order.

Austen-Cartmell, for the first respondent. There is no authority precisely in point, but it has been the practice of the Court to treat orders of this kind made under Order xxv., r. 4, as interlocutory orders for purposes of appeal, and the authorities, so far as they go, support this view: *Hind* v.

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Marquis of Hartington (1); *Stewart* v. *Royds* (2); *In re Croasdell and Cammell, Laird & Co., Ld.* (3)

[COZENS-HARDY M.R. referred to *Birch* v. *Birch* (4) and *Boswell* v. *Coaks*. (5)

FLETCHER MOULTON L.J. referred to *Salaman* v. *Secretary of State for India*. (6)]

Lyttelton Chubb, for the remaining respondents.

Arthur Mulligan, for the appellant. The test of whether an order is final or interlocutory is, as stated by Lord Alverstone C.J. in *Bozson* v. *Altrincham Urban Council* (7), whether or not it finally disposes of the rights of the parties. In *Hind* v. *Marquis of Hartington* (1) the order was against one only of several defendants and was for a stay only, not for dismissal, and those are the grounds on which Lord Coleridge C.J. based his decision. Those two points clearly differentiate that case from a case such as this, which absolutely puts an end to the action.

In *Salaman* v. *Secretary of State for India* (6) and *Boswell* v. *Coaks* (5) the Court may have treated the appeals as interlocutory, but, so far as appears, the point was not brought to the notice of the Court, and the mere tacit acquiescence of the Court in hearing what ought to be a final appeal as an interlocutory appeal cannot be treated as decisive of the question.

[*Austen-Cartmell* referred to *Salaman* v. *Warner*. (8)]

In *Stewart* v. *Royds* (2) the order appealed from was not, at the time when it was made, an order which finally disposed of the rights of the parties, but was a conditional order, and that case is distinguishable on that ground.

[BUCKLEY L.J. referred to *Price* v. *Phillips* (9), where Chitty J. refused leave to appeal from an order dismissing an action as frivolous and vexatious.]

The refusal of leave to appeal is not conclusive because it is often asked for ex abundanti cautela.

(1) (1890) 6 Times L. R. 267.
(2) (1904) 118 L. T. Jour. 176.
(3) [1906] 2 K. B. 569.
(4) [1902] P. 130.
(5) (1894) 6 R. 167.
(6) [1906] 1 K. B. 613.
(7) [1903] 1 K. B. 547.
(8) [1891] 1 Q. B. 734.
(9) (1894) 11 Times L. R. 86.

Applying Lord Alverstone's test, a final order is not necessarily an order which will preclude the bringing of a fresh action, but is an order which finally determines the rights of the parties in the particular proceeding, and it is not the less final because it is made upon an interlocutory application. This appeal is therefore not out of time.

COZENS-HARDY M.R. I have no intention of attempting the task of defining exhaustively or accurately the meaning of an interlocutory order. I leave that to others. The only point we have to decide here is whether the order in this particular case is an order which must be appealed against within the time limited for appeals from interlocutory orders. The plaintiff here commenced an action claiming the recovery of certain property. The defendants then did that which they were entitled to do under the inherent jurisdiction of the Court as well as under the express language of Order xxv., r. 4; they moved before the learned judge in the Court below that the statement of claim might be struck out and the action dismissed as frivolous and vexatious. They applied under Order xxv., r. 4, which is in these terms: [His Lordship read the rule.] The learned judge ordered that the statement of claim should be struck out and the action dismissed as against all the defendants as being frivolous and vexatious. From that order an appeal is presented by the plaintiff to this Court, which appeal is long out of time unless this is a final order for the purposes of appeal.

In my opinion this is an interlocutory order for the purposes of appeal. It may be that there is no authority directly and clearly in point, but I am driven to this conclusion by several considerations. In the first place I think it has been the practice to treat these appeals as interlocutory appeals. I have mentioned *Boswell* v. *Coaks* (1), in which that was done, and there are other cases. I do not attach very great importance to that, because the point does not seem to have been distinctly taken, but, notwithstanding that, I cannot wholly disregard the way in which practitioners and the Courts to some extent have dealt with the matter. Then I come to two decisions, one before Chitty J. and

(1) 6 R. 167.

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the other before the Court of Appeal, which seem to me to cover the present case. In *Price* v. *Phillips* (1) a motion was made to strike out the statement of claim and to dismiss the action in terms identical with the motion in this case. Chitty J. acceded to the motion and dismissed the action, and then he went on to say that "inasmuch as actions like the present should not be encouraged he declined—and he believed it to be merciful to decline —leave to appeal." That proceeded obviously on the footing that the order was an interlocutory order which could not have been appealed from without leave, and he declined to give leave. Then we come to a case which to my mind covers this in principle. That is the case of *Stewart* v. *Royds* (2), to which I was a party. It is only reported in the *Law Times Journal*. There an order was made in the Court below on the application of the defendant against the plaintiff, who was resident abroad, to give security for costs within a certain time, and if the security was not given within the specified time the action to be dismissed with costs. The security was not given within the time. The plaintiff appealed from the order dismissing the action on the ground that the security was not given owing to a mistake, and he therefore asked the Court to extend the time for giving security. Notice of appeal was given within three months of the date of the order, and the Court held that this was an appeal from an interlocutory order and that it ought not to be heard as being out of time. It is true that that might be said to be a conditional order, but the condition had been complied with, and so far as matters stood when it came before the Court of Appeal it was no longer conditional. It was an order dismissing the action in an event which had happened. I think that is in point. I do not forget also the case of *Hind* v. *Marquis of Hartington* (3), but, as Mr. Mulligan, who has argued this case very clearly, concisely, and ably, pointed out, there may be a distinction there, because Lord Coleridge C.J. seems to have based his judgment on a ground which I confess, with great respect, I have some difficulty in following, namely, that the order was against one defendant only, and also on the ground that in form the order was for a stay and not for a

(1) 11 Times L. R. 86, 87. (2) 118 L. T. Jour. 176.
(3) 6 Times L. R. 267.

dismissal. In principle, however, I think that it almost covers this case.

It is, on public grounds and on grounds of good sense, a matter of extreme importance that an appeal from an order dismissing an action as being frivolous and vexatious should be disposed of by the Court of Appeal, if disposed of at all, in the shortest possible time, and if there were no authority to assist us I should be disposed to come to the conclusion that an order of this kind ought to be treated as an interlocutory order. But, as I have said, having regard to the course of practice, to the decision of Chitty J. in a case precisely like this, and to the strictly analogous and scarcely distinguishable case of *Stewart* v. *Royds* (1) in this Court, I agree with the contention of the respondents that this appeal is out of time and ought to be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion for the same reasons. But I attach somewhat more importance to the case of *Salaman* v. *Secretary of State for India* (2), to which I referred in argument, where the Court of Appeal treated such an order as interlocutory. I remember perfectly well that the Court directed that a special Court of three should take that appeal, although it was an interlocutory appeal, owing to the importance of the question to be decided. Seeing that we had the nature of the appeal before us and deliberately treated it as an interlocutory appeal which would be taken by two judges unless the special circumstances of the case were such that the Court thought it more satisfactory that it should be taken by three, I am quite satisfied that the members of the Court considered the point and judicially came to the conclusion that the order in that case was an interlocutory order and treated it as such. In my opinion this amounts to a decision of this Court upon the point. I agree that this appeal should be dismissed.

BUCKLEY L.J. The rules are so expressed and the decisions are so conflicting that I confess I am unable to arrive at any conclusion satisfactory to my own mind as to whether this is

(1) 118 L. T. Jour. 176. (2) [1906] 1 K. B. 613.

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an interlocutory or a final order. It is plain that many orders which prima facie are final are not final but are interlocutory for the purposes of appeal, such, for instance, as orders made in favour of creditors or claimants in an administration action finally determining their rights. The reason, as I understand it, is that although their rights are finally determined it remains to work out the administration of the fund in order to give effect to those rights. There are many cases in which orders have been held to be interlocutory because something remains to be done to give effect to them, although in one sense they are final orders. This, however, is an order in favour of the defendants and it brings this action altogether to an end. To my mind it would be reasonable to say that that is a final order. But I do not think I am entitled to found myself on that, because there have been many decisions in which orders apparently final have been treated as interlocutory. The Master of the Rolls has referred to one or two of them. I could perhaps distinguish them if I set myself to work to do so, but practically the substance of the matter is this. It does not matter very much whether an order of this kind is held to be interlocutory or final so long as the Court decides the matter one way or the other so that suitors know what their rights are. I am not prepared to differ from the view taken by the other members of the Court. I yield my judgment to theirs without saying that I am completely satisfied with the reasons given for the view that this is an interlocutory order. A decision to that effect is certainly the more desirable, because if the order is reversed the action will have to go on and if it is to go on it ought to go on at once. I therefore concur with the other members of the Court. But I desire to say that in my opinion it is essential that the proper authority should lay down plain rules as to what are interlocutory orders, for as matters now stand it is the fact that it is impossible for the suitor in many cases to know whether an order is interlocutory or final.

Solicitors: *Fladgate & Co.; Young, Jackson, Beard & King; H. Osborne Carter.*

H. B. H.

GREEN *v.* HOWELL.

[1908 G. 816.]

C. A.
1909
NEVILLE J.
Oct. 22, 25; *Nov.* 1, 2.
1910
C. A.
March 10, 11.

Partnership—Breach of Duty as Partner—Expulsion—Notice—Validity

A deed of partnership provided that, in the event of either partner committing any breach of the partnership articles or any other flagrant breach of his duties as a partner, the other partner might by notice in writing terminate the partnership, provided that if any question should arise whether a case had happened to authorize the exercise of his power it should be determined by arbitration, if the offending partner so requested in writing within a given time. Under this clause one partner, without any preliminary warning to his co-partner, served him with a notice of dissolution on the ground that he had committed breaches of certain specified articles and had also committed a flagrant breach of his duties as a partner:—

Held (affirming the decision of Neville J.), that, in the absence of mala fides, it was not a condition precedent to the validity of the notice that the partner serving the notice should before serving it disclose to his co-partner the causes of complaint against him or give him an opportunity of being heard in his defence, and that the notice was valid.

Dicta of Romer J. in *Barnes* v. *Youngs*, [1898] 1 Ch. 414, overruled.

Trial of Action.

At the date of the deed of partnership hereinafter mentioned the plaintiff was the sole surviving partner of the firm of S. Ives & Co., who carried on the business of fish salesmen at Billingsgate Market, and the defendant was also a fish salesman carrying on business on his own account at Billingsgate Market. By a deed of partnership dated July 16, 1902, the plaintiff and defendant agreed to carry on the business of fish salesmen in partnership at Billingsgate Market under the name or style of S. Ives & Co. from July 21, 1902, during their joint lives, but the defendant was to be entitled to carry on his existing business for his own benefit.

By clause 6 all moneys which should be from time to time received by the partners on account of the partnership were to be immediately paid to the bankers for the time being of the partnership. By clause 8 the partners were to be entitled to the net profits of the business in equal shares. By clause 9 all

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sales or purchases of fish made at the stand for the time being belonging to the partnership business were to be deemed to be on account of the partnership and not otherwise. By clause 10 the defendant was to give to the partnership business his best assistance and supervision and to use his best endeavours to carry on the same to the greatest possible advantage. The plaintiff was to conduct the correspondence and to keep the accounts of the partnership, but was not to be bound to personal attendance or participation in the business. By clause 11 each partner was to be just and faithful to the other in all transactions relating to the business of the partnership and was to give a true account of the same in all respects to the other of them. By clause 12 no partner was to take any apprentice into the partnership business without the consent of the other partner. By clause 13 each partner was to inform the other partner of all letters, accounts, writing, and other things which should come to his knowledge concerning the business of the partnership. Clause 14 related to the keeping of the partnership books. Clause 15 provided that in the event of the death of either partner the share of the deceased partner was to be paid to his representatives within two months of his decease with interest thereon at 5 per cent. from his decease until payment, and that on such payment the business should belong to the surviving partner. Clause 16 provided that upon the determination of the partnership from any other cause than the death of a partner the partnership affairs should be wound up in the manner provided by the Partnership Act, 1890.

Clause 17 was as follows :—

"Provided always that if any of the said partners shall at any time during the partnership commit or be guilty of any breach of any of the provisions or stipulations herein contained or any other flagrant breach of his duties as a partner or shall fail to forthwith account for and pay over or refund any moneys for which he is accountable to the partnership or shall act in any other respect contrary to the good faith which ought to be observed between partners or shall become subject to the bankruptcy laws or enter into any composition or arrangement with or for the benefit of his creditors or shall be convicted of any

criminal offence or shall become permanently incapable through ill health of performing his duties as partner hereunder or shall become addicted to betting or gambling of any kind or to intemperance or other vicious modes of living or hazardous speculating on the Stock Exchange or the Fish Market or otherwise or without the consent of the other shall assign charge or attempt to assign or charge his interest in the partnership or its effects then and in every such case the other partner may by notice in writing sent to him by registered post to his usual or last known place of abode determine the partnership whereupon the same shall immediately cease and determine accordingly without prejudice to the remedies of the other partner for any antecedent breach of any of the stipulations or agreements aforesaid and thereupon the like provisions mutatis mutandis shall have effect respecting the payment out of the share of the partner as to whom the partnership shall be determined as aforesaid or otherwise as if he had then died and the partner giving such notice shall be at liberty to publish forthwith a notice of dissolution of the partnership in the name of and as against the offending partner Provided that if any question shall arise whether a case has happened to authorize the exercise of this power such question shall be referred to arbitration if the offending partner shall within three days after receipt of such notice as aforesaid so request in writing In the event of the expulsion of any partner he shall not for the space of ten years from the date of such expulsion carry on or engage or be interested directly or indirectly in any business competing or interfering with the business of the said firm nor solicit any of the customers of the partnership."

The business of the partnership was carried on first at stand No. 72 and afterwards at stand No. 105. The plaintiff did not personally attend to sell fish at the stand, but he conducted the correspondence and kept the accounts of the firm.

Some time in 1907 the defendant without the knowledge or consent of the plaintiff allowed one Kitchener to occupy and use the partnership stand No. 105 and to carry on the business of a fish salesman thereat under the style of Ives & Howell, and Kitchener continued to carry on business there under that style

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until May, 1908. During this period the defendant carried on the partnership business at a smaller stand, No. 83 A, which he rented from the Markets Committee, and he excluded from the daily returns which he sent to the plaintiff the purchases and sales of fish made at the partnership stand No. 105. The plaintiff first became aware of these facts in March, 1908, and on March 31, 1908, he sent to the defendant a notice under clause 17 of the partnership deed determining the partnership and requiring the defendant forthwith to leave the partnership stand and to refrain from any future interference in the affairs of the partnership business.

The grounds on which this notice was given were thus stated:—

"(1.) You have committed breaches of all or some of the following clauses of the said deed, namely, clauses 6, 9, 10, 11, 12, 13 and 14.

"(2.) You have committed a flagrant breach of your 'duties as a partner' within the meaning of clause 17 of the said deed.

"(3.) You have acted contrary to the good faith which ought to be observed between partners."

It appeared from a letter written by the defendant to the plaintiff in which he acknowledged the receipt of the notice that he was perfectly well aware of the cause of complaint against him. The defendant refused to withdraw Kitchener from the stand and disputed the validity of the notice, and pending the determination of the rights of the parties the superintendent of the market directed that the stand should be divided and that one half should be occupied by the defendant, who handed over such half to Kitchener, and the other half by the plaintiff.

The plaintiff brought this action for a declaration that the partnership was duly determined by the notice and for consequential relief, and moved for an interlocutory injunction. Upon the hearing of the motion the defendant undertook not to use the name and style of S. Ives & Co., not to attend at stand No. 105 or interfere with the business carried on by the plaintiff thereat, not to withhold from the plaintiff the documents of the partnership business, and not to solicit the customers of the partnership other than such as had been his own customers before the

commencement of the business; and on May 11, 1908, the defendant and Kitchener withdrew from the occupation of the half of the stand which had been allotted to the defendant by the superintendent of the market.

The action was heard before Neville J. on October 22 and 25 and November 1 and 2, 1909.

Peterson, K.C., and *Hon. M. Macnaghten*, for the plaintiff.

Jenkins, K.C., and *A. D. Maclaren*, for the defendant, contended that one partner was not entitled to spring a notice of dissolution upon another without first calling the attention of the latter to the causes of complaint and giving him an opportunity of meeting the case made against him: *Barnes* v. *Youngs* (1); *Blisset* v. *Daniel* (2); *Wood* v. *Woad* (3); *Fisher* v. *Jackson.* (4)

NEVILLE J. In this case there are one or two points which I have to decide between the parties, and the first is a question of law as to whether the notice given under article 17 of the partnership deed is a valid notice of expulsion from the firm. Now the provisions of the partnership deed are to the effect that upon certain breaches, which I will not particularize, of the articles and of the duty of a partner the other is entitled to give a notice putting an end to the partnership and involving certain consequences, one at all events of which is penal. Upon the giving of such notice it rests with the other partner to whom the notice is given, if he thinks fit, within a limited period to have the matter referred to arbitration, and thereupon the arbitrator has to decide whether the circumstances have arisen which were provided for under the articles of partnership. Now, it is said that a notice under article 17 must be a notice giving particulars of the grounds of complaint made against the other partner, and that the notice in question does not fulfil that condition. I think, taking the contract between the parties as shewn in the articles of partnership themselves, it cannot be successfully contended that anything more is provided for than a notice determining the partnership, and I see no ground for suggesting that the parties themselves ever agreed that anything more should

(1) [1898] 1 Ch. 414.
(2) (1853) 10 Hare, 493.
(3) (1874) L. R. 9 Ex. 190.
(4) [1891] 2 Ch. 84.

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be given than a bare notice to terminate the partnership. But then it is said that if that be so there is a general principle applicable to cases of this kind which makes a notice in the form of the present notice and under the circumstances in which it was given invalid, and that is the point of law that I have to consider. I have been referred to *Blisset* v. *Daniel* (1) and many other cases, in which it has been held, and the principle has been laid down in the widest possible terms over and over again, that where a question of this kind—a question of expulsion—has to be determined either by the other party or by members of a committee, or by a majority of the partners, or by any other domestic tribunal constituted by agreement between the parties, that discretion cannot be exercised unless and until the accused party has had the opportunity of laying his case before the tribunal which has to judge him and giving them the opportunity of coming to a just conclusion. I think that principle is clear beyond the possibility of dispute, founded in natural justice, and established, I was going to say by innumerable, but certainly by numerous decisions. But it does not appear to me that those authorities have any bearing upon the case before me. Here it is not for either party to decide whether he is entitled to expel his partner from the partnership or not. He is only given the power to put certain proceedings into train whereby it shall ultimately be decided by the proper tribunal. Unless, of course, the partner to whom the notice is given admits his delinquency and desires to carry the matter no further, the partner who gives the notice merely puts in train proceedings for obtaining the decision by the proper tribunal of the question arising between the parties, and I fail to see what bearing upon a contract of that kind the cases that have been cited have. But the cases cited do not end there, and the case of *Barnes* v. *Youngs* (2) was cited to me, which was decided by Romer J. when he was sitting as a judge of first instance. The application before him was an application on the part of the partners who had given the notice—the notice was there given by several partners—to stay proceedings in an action and to refer the matter to arbitration, and

(1) 10 Hare, 493. (2) [1898] 1 Ch. 414.

what the learned judge had to consider and decide was whether it was a case more fitted to be tried in a Court of justice, or whether it was better that it should go to the domestic forum which had been provided by the parties, and he decided on the facts of that case that it was better that the matter should be tried by the Court. But I cannot read the judgment without seeing that he does express an opinion that in the agreement before him (and so far as it is reported it bears a strong resemblance to the present agreement) the same formalities were necessary between the partners as would have been necessary in a case where the decision rested with one of them, and that the partners giving the notice in that case ought to be treated as being under the obligation which they would be under had they themselves formed the tribunal which should decide whether the partner who had received the notice was to go or whether he was to stay. As a decision of course in that particular case I have nothing to say to it; it may have been perfectly right, but if it was intended to lay down a general principle applicable to all cases where partners have agreed that one may give notice to another of dismissal, and the question of the validity of that notice shall be determined by a tribunal which they have created themselves, then, with the greatest possible respect, I dissent from that view. I come therefore to the conclusion that the plaintiff has given a good notice of dismissal to the defendant, and that it was unnecessary to specify, at all events to any greater extent than has been done, what was the nature of the complaint against the defendant.

I think that that does not entirely dispose of the matter, because I can conceive of cases where the method in which the right had been exercised under the articles of partnership was an indication that the plaintiff was not proceeding bona fide, but was attempting to turn the provisions of the articles of partnership unfairly to the disadvantage of his co-partner, and I can certainly understand that under such circumstances an equity might arise which the Court would enforce, and that the Court would refuse to allow the plaintiff to proceed upon his notice; but I do not find anything of the kind here.

[His Lordship discussed the evidence on this point and came to

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the conclusion that there had been no unfair dealing and no unfair taking advantage on the part of the plaintiff in the present case, and that he had a right to have the matter decided on the notice he had given, either by the Court, before which it ultimately came, or, had the defendant desired it, before a tribunal of arbitration. He then discussed the question whether the plaintiff was justified in giving the notice and found as a fact upon the evidence that the defendant had committed a flagrant breach of his duties as a partner and that there was ample justification for the notice.

In the result his Lordship declared that the partnership was determined by the notice and directed accounts and inquiries on that footing. He also granted an injunction in the terms of clause 17, but, the plaintiff by his counsel consenting, this injunction was not to prevent the defendant from carrying on his existing business of a fish salesman at Billingsgate.]

The defendant appealed and asked that it might be adjudged that the notice of March 31, 1908, was invalid, that the partnership should be deemed to be dissolved as from that date, and that the partnership affairs should be wound up in manner provided by the Partnership Act, 1890, in accordance with clause 16 of the partnership deed.

The appeal was heard on March 10 and 11, 1910.

Jenkins, K.C., and *A. D. Maclaren*, for the defendant. It is irrelevant for the purposes of this appeal whether the defendant has committed a breach of the partnership articles or not, because the notice on which he was dismissed is wholly void at law inasmuch as the plaintiff before serving this notice on the defendant did not specify the nature of the complaint made against him and did not give him an opportunity of being heard in his defence. The broad principle applicable to all these cases of social contracts, where, for example, it is sought to expel a member from a club or a partner from the partnership, is that no man shall be condemned unheard. One of the earliest cases in which that principle was applied is *Rex* v. *Cambridge University* (1),

(1) (1723) 1 Str. 557.

where a mandamus was granted against the university authorities to restore a graduate to his academical degrees. *Barnes* v. *Youngs* (1) is directly in point and is indistinguishable from the present case. This principle has also been applied to partnership cases in *Wood* v. *Woad* (2); *Steuart* v. *Gladstone* (3); *Blisset* v. *Daniel.* (4)

[BUCKLEY L.J. *Blisset* v. *Daniel* (4) was distinguished in *Russell* v. *Russell.* (5)]

Apart from authority it is only elementary justice that a man should be told by the expelling partner what is the nature of the charge against him, since powers of this kind are extremely liable to abuse.

Peterson, K.C., and *Hon. M. Macnaghten*, for the plaintiff. The special arbitration clause in article 17 prevents the possibility of any unfairness arising from this notice. The principle that a man shall not be condemned unheard applies only to a case which involves the exercise of judicial or quasi-judicial functions. It has no application to the present case, where the question whether a case has arisen which justifies the expulsion is to be determined not by the expelling partner, but, if the offending partner so requests, by arbitration, or, if not, by the Court. *Barnes* v. *Youngs* (1) is the case most nearly in point, but the action of the expelling partners in that case was not bona fide and the only question which the Court had to determine was whether the case should go to arbitration or should be tried by the Court. The expression of opinion on which this appeal is founded is merely obiter. There is no decision which binds the Court to accept the appellant's view and there is nothing in reason or justice to warrant that view. The power to give notice of expulsion arises on a number of events, e.g., conviction of a criminal offence. In that case it could not possibly be contended that the expelling partner must give the other partner an opportunity of being heard before serving the notice: *Carmichael* v. *Evans.* (6)

Jenkins, K.C., in reply.

(1) [1898] 1 Ch. 414.
(2) L. R. 9 Ex. 190.
(3) (1879) 10 Ch. D. 626.
(4) 10 Hare, 493, 530, 531.
(5) (1880) 14 Ch. D. 471.
(6) [1904] 1 Ch. 486.

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COZENS-HARDY M.R. This is an appeal from a decision of Neville J. and it raises a question whether the appellant, the defendant, has been properly expelled from the partnership constituted between him and the plaintiff. That really depends upon the true construction of one clause in the partnership deed and upon the consideration of certain general principles of law applicable to partners. The partnership was for joint lives. The business was that of fish salesmen at Billingsgate. The defendant was the partner who conducted the actual business at Billingsgate. The plaintiff kept the books and looked after the financial affairs of the partnership. Clause 17 of the partnership deed provides as follows: [His Lordship read the clause.] We have had a great deal of discussion upon the mutual obligations and duties of partners. So far as I am concerned, I am disposed to think they may all be embraced in the well-known phrase that a partnership is a contract in which uberrima fides is required. A clause like this enabling one partner to expel the other cannot be relied upon unless there is good faith; it cannot be used if the motive is really to get an undue advantage over the other partner by purchasing him out on unfavourable terms; but that is the root of the principle, so far as I am aware, applicable to partners in these relations. There is also a further principle, not in any way confined to partnership transactions, which is this, that wherever it is left to a judicial tribunal, strictly so called, or a quasi-judicial tribunal, to determine whether a person is or is not properly excluded, common justice requires that explanation and notice shall be given to the person said to be amenable to the jurisdiction and that he should have an opportunity of defending himself. In the present case I am not satisfied that there has been any ground for invoking either of these principles. The learned judge has found as a fact, and I see no reason to doubt it, that there has been no unfair dealing, no unfair taking advantage on the part of the plaintiff. Is it possible to say that the plaintiff acting under clause 17 was in a judicial position or quasi-judicial position? Plainly not. He was really, so to speak, the moving party, the litigating party, the person who was starting proceedings which would ultimately lead to a proper adjudication on the rights of the parties. [His

Lordship then referred to the service of the notice of March 31, 1908, and read the terms of the notice.]

That notice was given. It was delivered quite properly. There was no invocation of an arbitrator to say whether the circumstances had arisen which justified the expulsion. It has been proved in the action that circumstances had arisen which justified the expulsion, for the learned judge has found the facts which he described, and certainly I should describe, as a flagrant breach by the defendant of his duties as a partner. The only point, therefore, that remains is this, whether in a case where there has been a flagrant breach by the defendant of his duties as a partner, and where the plaintiff has acted without unfair dealing or unfair taking advantage of the defendant, the whole proceedings are invalid simply because before giving this notice of dissolution the plaintiff had not given the defendant an opportunity of explaining and had not stated more explicitly the grounds on which he chose to act. On principle I can see no justification for that contention. It seems to me the fair reading of this clause 17 is this: The plaintiff, one of the two partners, believes and asserts that there has been a breach entitling him to determine the partnership. He gives notice of that, but he does not in any way act in a judicial character. All he does is to start proceedings, leaving it open to the defendant to appeal to the domestic tribunal which the parties have agreed upon, namely, the arbitrator, to decide whether a case has happened which justifies the expulsion. If that is not sufficient, then by the ordinary procedure of the Courts of justice the Court has to decide that question. There has been a trial here, a number of witnesses have been examined, and the learned judge has found without hesitation that there was a flagrant breach of the defendant's duty as a partner justifying, undoubtedly, apart from the form of the notice, the expulsion. Is there any line of authorities, such as Mr. Jenkins has urged upon us, binding us to hold that the notice is altogether bad and that all proceedings thereunder must be disregarded because no opportunity was given to the defendant to explain or because the notice did not more carefully specify the grounds of complaint? Of the earlier authorities which have been relied upon

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Blisset v. *Daniel* (1) is the first. That is a case entirely distinguishable from the present on the ground indicated by Sir George Jessel in *Russell* v. *Russell.* (2) *Steuart* v. *Gladstone* (3) again is a case of an entirely different kind. There the point did not arise and certainly was not decided. *Wood* v. *Woad* (4) is a case in which a quasi-judicial tribunal, that is to say, the committee of members which had to deem that the man was unworthy of being a member, were acting in a capacity which involved the application of the settled principle of law that a man charged in that way must have an opportunity of explaining his case. Those, with one exception, to which I will refer, are the only authorities which I think it is necessary to mention. We have most properly had our attention called to the case of *Barnes* v. *Youngs* (5), a decision of Romer J., and it is quite unnecessary for me to say that any decision of that learned judge will always be treated by me with the utmost respect. In that case the articles contained a clause very like the clause in this case, although the facts of the case and the conduct of the parties were widely different. There the plaintiff and the defendants were partners, and there was a clause which provided that if any of the partners should during the continuance of the partnership be "guilty of immorality or other scandalous conduct detrimental to the partnership business," then the other partners might determine the partnership and publish a notice of dissolution, and there was a proviso that if any question should arise whether a case had happened to authorize the exercise of that power such question should be referred to arbitration. The defendants on December 21, 1897, signed a notice as follows: "We, the undersigned, hereby give you notice to determine the partnership heretofore subsisting between us under articles of partnership dated January, 1896, so far as you [naming the plaintiff] are concerned, on the ground that you have made a breach of clause 31 of the said articles of partnership by being guilty of notorious immorality, which immorality is detrimental to the partnership business." In the

(1) 10 Hare, 493.
(2) 14 Ch. D. 471.
(3) 10 Ch. D. 626.
(4) L. R. 9 Ex. 190.
(5) [1898] 1 Ch. 414.

following January the plaintiff, the excluded partner, commenced an action claiming a declaration that the partnership had not been dissolved, an injunction restraining the publication of notice of dissolution, and an injunction restraining the exclusion of the plaintiff or obstructing him when acting as partner. That being so, the defendants moved, in pursuance of the arbitration clause to be found in the articles, which I have not read, that all proceedings in the action be stayed and all matters in dispute referred to arbitration according to the provision in the partnership articles. It appeared from the evidence on this motion that the plaintiff, the expelled partner, was living with a woman who was not his wife, but that this state of circumstances was known, the report in the *Law Reports* says, to some one or more of the defendants, the report in the *Law Journal* says to all the defendants, even before the articles of partnership were signed, and moreover it was proved that the business was in a very flourishing condition, that the matter had not been detrimental to the partnership business, and the allegation was that the notice was not given bona fide. That being so, the only question before Romer J. was, Aye or No, is this a matter in which in the exercise of my judicial discretion I shall stay the proceedings on the ground of the arbitration clause, or is it a matter in which in the exercise of my discretion I shall do nothing of the kind, but retain the action and decide it in due course when the action comes on for trial? The learned judge held, for reasons which seem to me obviously sufficient, that it was a case which it was much better to try by a judge of the High Court in the ordinary course, and, there being, to say the least, very great suspicion in the case, very great doubt whether it was not merely an attempt on the part of the defendants to oust the plaintiff and to get the benefit of his interest in the property, he refused to make any order on the motion to stay, except that he made the costs costs in the action, and, so far as we know, the action went on for trial, and I suppose it was then and there decided whether the dissolution was good or whether it was not. It is quite right to say that in one part of his judgment the learned judge does take a view which, so far as I am aware, is not supported by any antecedent authority, and

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which, with the utmost respect, I am not prepared to follow. He says (1): "In the first place, there is to my mind a simple, or comparatively simple, preliminary question—whether the notice given the plaintiff is good or bad—which is much more fit for this Court to decide than an arbitrator, and which, if it had come before an arbitrator, he would have probably referred to the Court. It is certainly a question which is now ripe for decision, and which, in the interest of both parties, ought to be decided forthwith." Then he goes on to say: "A power to expel of this class, as has been shewn in many cases, must be exercised with the utmost good faith"—that there is no doubt about—"and undoubtedly, to my mind, it is essential that partners exercising a power of this kind should before they do so, and peremptorily exclude a co-partner and advertise that co-partner's exclusion, give him an opportunity of knowing before they serve the notice what the cause of complaint is, so that at any rate he may have an opportunity of explaining and, if possible, satisfying them that no good cause of complaint exists. I think partners are not entitled to spring a notice of dissolution on their co-partner without the slightest preliminary warning being given to him, and without calling his attention in the slightest degree to any alleged cause of complaint, and without giving him the slightest opportunity of meeting the case which is alleged against him. Now, that is what the defendants did in this case. It is sworn to by the plaintiff, and not denied by the defendants, that when they purported to serve this notice they had previously raised no cause of complaint against the plaintiff, and given him no opportunity of knowing that there was a cause of complaint, or of remedying that if he knew it existed. The question then arises, was that notice good or bad? In my opinion under the circumstances that notice was clearly bad." Then he goes on to say: "If they do serve any further notice after giving the plaintiff a full opportunity of knowing what the exact cause of complaint against him is, and meeting it if possible, a question may arise hereafter which ought to go to arbitration, but no such question arises now." As I have said, I am quite clear that the order of the learned judge refusing to stay the

(1) [1898] 1 Ch. 417.

action, keeping it in his own Court, and letting it go on to trial was obviously right; but I am not prepared to assent to his view on the first branch of this case, which, so far as I know, for the first time laid down that a partner acting with perfect good faith, not taking any unfair advantage of his co-partner, cannot give the notice stipulated for by the clause unless he gives the man an opportunity of explaining and unless it specifies the cause of complaint. That being so, I think the view taken by Neville J. was quite right. He puts it very clearly and well in his judgment where he says, after referring to this case, "As a decision of course in that particular case I have nothing to say to it; it may have been perfectly right, but if it was intended to lay down a general principle applicable to all cases where partners have agreed that one may give notice to another of dismissal, and the question of the validity of that notice shall be determined by a tribunal which they have created themselves, then, with the greatest possible respect, I dissent from that view." I cannot overlook the fact that no injustice whatever has been done. It is perfectly plain, I think, from the letter which was written immediately after the notice was given that the defendant knew very well what the cause of complaint was. It is quite clear that he knew that it was the transaction with Kitchener, and it is also quite clear that he has had ample opportunity of contesting the point that there was a flagrant breach of duty such as justified dissolution. On the whole, therefore, I think this appeal must be dismissed, and dismissed with costs.

BUCKLEY L.J. This appeal by the defendant comes before this Court under the following circumstances. The defendant does not before us dispute that before the plaintiff on March 31 gave his notice under article 17 of the partnership deed he, the defendant, had committed a breach of the partnership articles, but he argues that, as matter of law, he ought before that notice was given to have had particulars given him of the exact matters of which complaint was made against him and to have had an opportunity of being heard; and that, inasmuch as that was not done, the notice is invalid. The whole question is whether that is accurate as matter of law. In my opinion it is not.

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The whole matter between the parties arises under the contract contained in the partnership deed of July 16, 1902. As part of that contract it was provided by article 17 that in certain events the one partner might serve the other with a notice to determine the partnership, followed by a proviso that if any question should arise whether a case had happened to authorize the exercise of this power such question shall be referred to arbitration. In acting under that clause the partner who was serving the notice was in no sense acting in a judicial or quasi-judicial capacity. He was not a person determining anything at all. He was a person asserting something. He was saying, "I assert that you have committed a breach of the partnership articles, and, that being so, I determine the partnership as against you." The defendant was entitled of course to say, "Your assertion is quite wrong, I have committed no breach"; and if he did so the contract had provided that that matter in dispute between the parties should, if the defendant within three days so required, be referred to arbitration. That was the judicial authority which was to decide that issue of fact. Moreover, if he did not within the three days give notice to refer to arbitration it would be perfectly competent to him to appeal to a Court of justice. The arbitration clause is not one which sets up jurisdiction; it is one which limits or defines the jurisdiction which is to determine between the parties. After the party giving the notice has made the assertion that the event has happened, it falls to be decided by an arbitrator if the arbitration clause is made use of, and, otherwise, by a judge, whether the event has happened or not. It is familiar to all of us that partnership relations are relations in which the greatest good faith must be observed between the parties. There is no allegation at all here that the plaintiff acted otherwise than in perfect good faith, so that I may put that wholly on one side. It is also a familiar principle which appeals to all of us as a matter of justice that a man should never be condemned without being heard. The first of those principles is excluded because the plaintiff did act with good faith. The second principle is excluded because the plaintiff had no power to condemn the defendant in any way. It was not for him to try any question; he could

and did assert that the defendant had committed a breach, and then it was for somebody else to try the question whether that was so or not. Therefore an appeal to that principle of justice, that a man should not be condemned without being heard, has no application at all in the present case.

We have been referred to a number of authorities. I am not going through them. They are authorities which illustrate under different circumstances the second of the two principles which I have mentioned. I am only going to refer to the decision of Romer J. in *Barnes* v. *Youngs* (1) for the purpose of saying what it seems to me was the ground of the learned judge's decision and how far I am able to go with him. His decision was based on two grounds. The second ground was that inasmuch as there was a question between the partners whether the partner giving the notice had acted in good faith, that was a charge which ought to be dealt with by a Court of justice and not by an arbitrator. That, of course, was a perfectly good ground. Upon that head no question arises. The previous ground is the one on which difficulty arises. I think there again the learned judge was proceeding upon the question of whether there was good faith or not. I find him using these words in the beginning of this part of his judgment: "A power to expel of this class, as has been shewn in many cases, must be exercised with the utmost good faith." Then he goes on with words on which Mr. Jenkins has much relied, saying that when the partners purported to serve their notice they had previously raised no cause of complaint. If that be read as meaning that that was an indication that they were not acting in good faith, it is material. I think that this earlier part of his judgment may be supported if it meant "Upon the question of bona fides as between partners I am not going to uphold a notice which is given in bad faith." But if he meant (and I agree that it is a meaning which his words may bear) that as between partners it is a condition precedent to the giving of a valid notice to expel that the partner by whom the notice is given shall, before giving him notice, tell his partner exactly what is complained of and hear him, then I am unable to

(1) [1898] 1 Ch. 414, 418.

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agree. I do not see, taking this particular case, that the plaintiff was in any sense or meaning of the words acting in a judicial or quasi-judicial capacity when he was taking upon himself to assert that the defendant was committing a breach of the articles. If he was not, there was no reason why he should hear him. As matter of fact the defendant was not left in any danger or condemned in any way by that act on the part of the plaintiff. All that happened was that the plaintiff took a certain step which set in motion a certain course of procedure upon which the defendant had every opportunity of asserting that the plaintiff was wrong. For these reasons, it being undisputed before us that the event had arisen which entitled the plaintiff to give the notice, it is no objection to the validity of the notice that the plaintiff had not before the notice was given furnished to the defendant particulars of what the complaint against him was and an opportunity of satisfying the plaintiff that he was mistaken. If that view were the true one, it would result that in every case the partner who is exercising his right to determine the partnership would or might have to go through two processes. If he gave a notice without particulars and it was ultimately found, as it is found in this case, that he was right, he would have to give a second notice after there had been a decision between the parties that he was right. It seems to me that that is quite impossible. It seems to me that the plaintiff is entitled at the outset to say "In my view the event has happened and I give you a notice justified by what I say are the facts." It is for the defendant then to say, and he is entitled to say, to the arbitrator, if he goes before an arbitrator, or to the judge, if he goes to a Court of justice, "You are wrong and your notice is wrong." For these reasons I think the appeal should be dismissed.

JOYCE J. I agree.

Solicitors: *Rutter, Veitch & Bond; H. S. A. Foy.*

H. B. H.

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[1909 C. 3646.]

WARRINGTON J.

1910

Feb. 4.

Industrial and Provident Society—Disputes between Society and Members—Rules—Arbitration—Ultra vires Acts—Stay of Proceedings—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 22—*Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *s.* 49.

The rules of an industrial and provident society, which substantially followed the terms of s. 49 of the Industrial and Provident Societies Act, 1893, provided for the reference of all disputes between the society and its members to arbitration.

A member of the society commenced an action against the committee of management of the society for a declaration that certain resolutions passed by them were ultra vires the society, and for consequential relief :—

Held, that the plaintiff's claim was a dispute within the arbitration rule and s. 49, and that the proceedings in the action must be stayed.

Where the rules of a registered society contain a provision for the reference of disputes between a member and the society and its officers to arbitration it is not an answer to an application for a stay of proceedings that the question at issue is whether or not the act complained of is ultra vires.

Stone v. *Liverpool Marine Society*, (1894) 63 L. J. (Q.B.) 471, applied.

Motion.

The Haslemere Builders, Limited, was a society registered in 1902 under the Industrial and Provident Societies Act, 1893.

By s. 49, sub-s. 1, of the Act, "Every dispute between a member of a registered society, or any person aggrieved who has for not more than six months ceased to be a member of a registered society, or any person claiming through such member or person aggrieved, or claiming under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society, if they contain any such direction, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court."

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The society was governed by certain general rules and special rules which had been registered as the rules of the society, the general rules being applicable to matters covered by them except in so far as modified by the special rules. Rule 117 of the general rules was as follows :—" Disputes—how to be determined.—All disputes arising between a member, or any person aggrieved, who has for not more than six months ceased to be a member, or any person claiming through a member, or such person aggrieved, or under the rules of the society, and the society or any officer thereof, ... shall be dealt with as follows " ; and then followed provisions for dealing with disputes by arbitration.

The plaintiff, who was the holder of 200 shares in the society, commenced the present action, claiming by his writ (*a*) as against the committee of the society a declaration that certain resolutions passed by them as such committee, purporting to permit certain members of the society to withdraw from their membership, or to cancel or give up shares in the society, and authorizing payments to be made to such members for the purchase by the society of such shares, or otherwise in respect of such withdrawal, were ultra vires the society and void ; (*b*) as against the committee and the society a declaration that the resolutions passed by the committee whereby it was resolved that land of the society should be conveyed to certain members in consideration of the liquidation or cancellation of shares held by them respectively were ultra vires the society and void ; and by paragraphs (*c*) and (*d*) of the writ he asked for consequential relief.

This was a motion by the defendants that all proceedings in the action might be stayed on the ground that the matters in difference between the parties were disputes within the meaning of s. 49 of the Act of 1893 and had by virtue of that section and the rules of the defendant society been agreed to be referred to arbitration.

R. M. Pattisson, for the motion. It is not admitted that the acts complained of by the plaintiff have in fact been committed, or that, if they have been committed, they are ultra vires. But assuming against the defendants that they have been committed, then there is a dispute between the plaintiff as a member and the

society and its officers which under the Act and the rules has to be referred to arbitration. The issue of the writ must be founded on a claim by the plaintiff that the committee have done something which is ultra vires the society and that thereby the plaintiff suffers an injury in his capacity of a member of the society. That necessarily involves a dispute between a member and the society and its officers. The question arises on the construction of s. 49 of the Industrial and Provident Societies Act, 1893. Sect. 5, sub-s. 2, of the Act shews that rules are essential to the registration of a society under the Act. By s. 22 the rules are made binding on the society and all its members. By s. 10, sub-s. 1, the rules are to contain provisions in respect of the several matters mentioned in the Second Schedule to the Act. That schedule does not provide that the rules must contain provisions as to how disputes are to be determined. But if the rules do contain such provisions, then the method of determining the disputes provided for by the rules must be followed. In the present case the rules provide that disputes shall be referred to arbitration, and the Court has therefore no jurisdiction to determine this dispute. It makes no difference that the plaintiff's complaint is that the officers of the society have done something which was not within their powers to do: *Stone* v. *Liverpool Marine Society*. (1) In that case it was held that a dispute whether certain proceedings of the officers of a society established under the Friendly Societies Act, 1875, were ultra vires was a dispute within s. 22 of that Act, which, for all practical purposes, is identical in terms with s. 49 of the Act of 1893.

In *In re Royal Liver Friendly Society* (2) Chitty J. indicated his opinion that a dispute like the one in the present case was a dispute within s. 22 of the Act of 1875. In that case no doubt it was held that the High Court had jurisdiction to deal with the matter in dispute. But there the rules contained no provision for the settlement of disputes by arbitration. There was nothing there, as here, which was obligatory as to the manner in which disputes should be decided. In the present case the Act and the rules constitute a code for dealing with these disputes which is binding on the Court: *Municipal Permanent Investment Building*

(1) 63 L. J. (Q.B.) 471.

(2) (1887) 35 Ch. D. 332, 335.

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Society v. *Kent*. (1) That was the case of a building society, but the same principle applies here.

Johnston Edwards, for the plaintiff. The words "every dispute" in s. 49 must mean every dispute having relation to the purposes of the rules and the society and do not include disputes on matters which are ultra vires. The dispute in the present case being one as to whether certain acts of the committee are ultra vires does not fall within the arbitration rule. It is outside the scope and powers of a society like the present to purchase its own shares: *Trevor* v. *Whitworth*. (2)

[WARRINGTON J. The question is, Has the plaintiff been injured in his capacity of a member?]

I rely upon *Palliser* v. *Dale* (3) and *Andrews* v. *Mitchell*. (4)

[WARRINGTON J. The principle of those cases is the same as that in cases relating to clubs, namely, that the Court cannot interfere unless the society is not acting within its rules or is acting contrary to the principles of natural justice.]

Some limit must be imposed as to the matters which are within the rules. It is submitted that the rules are confined to matters which are intra vires the society, and that a member, when he enters into the contract constituted by the rules, cannot be taken to have contemplated their extension to ultra vires acts.

WARRINGTON J., after stating the nature of the application and reading s. 49 of the Act of 1893 and rule 117 of the society's rules, continued:—The only question I have to determine is whether the dispute to which this action relates is or is not "a dispute between a member and the society or an officer thereof" within the meaning of s. 49 of the Act of 1893. There is no question that the plaintiff is a member of the society. Therefore, taking the words of the section literally, there is a dispute between a member of the society and the society or an officer thereof, because, with the exception of Moorey, the defendants are or have been officers of the society. Therefore the question is whether or not, although the dispute literally falls within the actual words of the section, it is within the meaning of it.

(1) (1884) 9 App. Cas. 260, 277, 278.
(2) (1887) 12 App. Cas. 409.
(3) [1897] 1 Q. B. 257.
(4) [1905] A. C. 78.

Now the facts to which the dispute relates are indicated in the first two paragraphs of the writ. [His Lordship read claims (*a*) and (*b*) above set forth, and continued.] It is said on behalf of the plaintiff that, because the question raised by the action is whether or not certain acts of the society are ultra vires the society, the dispute is not a dispute between a member and the society within the meaning of the section. The ground of the plaintiff's action must be that he is injured by the acts in question in his capacity as a member of the society. Therefore the dispute is between a member in his capacity of member and the society or an officer thereof. It may be that if a dispute arose between the society and some person not affecting that person's capacity as a member the case would be different. But here the subject-matter of the dispute affects the plaintiff in his capacity of member. The question is whether certain acts of the committee purporting to bind the society were or were not within the powers of the society. That depends upon the construction of the constituent documents of the society, that is, the rules and the Act under which the society is registered. But a dispute relating to the rules appears to be exactly within the purview of s. 49. Therefore, independently of authority, I should think that this was a "dispute" within the meaning of the section. But, further, I think the case is covered by the authority of *Stone* v. *Liverpool Marine Society*. (1) Two disputes arose in that case; one was whether the second wife of an enrolled member was entitled to enrolment and the benefits of the society, and the other was whether the society was entitled to dispose of its funds otherwise than for the benefit of its members. The matter came before a Divisional Court consisting of Mathew and Collins JJ., and Mathew J., who delivered the judgment of the Court, held, with regard to both disputes, that they came within the society's rule as to arbitration and the provisions of s. 22 of the Friendly Societies Act, 1875, which correspond practically verbatim with those of s. 49 of the Industrial and Provident Societies Act, 1893. With regard to the second ground of dispute in that case, which more nearly than the other corresponds with the dispute in the present case, Mathew J. says:

(1) 63 L. J. (Q.B.) 471, 473.

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"In the second place, and on the second branch, we are asked for an injunction upon the ground that there is evidence that the committee are about to misappropriate the society's funds," that is, to deal with them in a way outside the powers of the society. He goes on to state that the plaintiffs had failed to shew that there was evidence to convince the Court that their rights were likely to be infringed. "But," he adds, "it must be borne in mind that s. 22 also applies to this branch of the claim, and that any award made upon it can be readily enforced by the county court." He therefore held, as to the second branch of the dispute, that although the dispute was whether the act in question was ultra vires or not, yet it fell within s. 22 of the Friendly Societies Act, 1875, which, as I have already said, is really exactly the same as s. 49 of the Industrial and Provident Societies Act, 1893, which applies in the present case. The plaintiffs appealed, but the Court of Appeal (consisting of Lord Esher M.R., Lopes L.J., and Davey L.J.) dismissed the appeal, saying that they agreed entirely with the grounds upon which the Divisional Court put their judgment. That case seems to me to be a distinct authority that it is no answer to an application for a stay of proceedings to say that the question at issue is whether or not the act complained of is ultra vires.

The two cases on which counsel for the plaintiff has relied—*Palliser* v. *Dale* (1) and *Andrews* v. *Mitchell* (2)—seem to me to have no application to the present case. In *Palliser* v. *Dale* (1) the society purported to expel a member. He said he was a member, the society said he was not, and the Court of Appeal held that it was not open to the society to say that he was not a member and at the same time to say that he was a member for the purpose of bringing the provisions of the rules as to arbitration into operation. In the second case, *Andrews* v. *Mitchell* (2), the question was whether the arbitration committee had rightly expelled a member, the point being that they had acted neither within the rules nor in accordance with the principles of natural justice. Both those cases, therefore, have nothing to do with the case before me.

There must therefore be an order that all proceedings in the

(1) [1897] 1 Q. B. 257. (2) [1905] A. C. 78.

action be stayed, and the plaintiff must pay the costs of the action, including the costs of this application.

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Solicitors: *Lovell, Son, & Pitfield, for J. Pitfield, Petworth; Debenham & Sugar.*

W. I. C.

In re A. BOYNTON, LIMITED. HOFFMANN *v.* A. BOYNTON, LIMITED.

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[1908 A. 527.]

Company—Debenture-holders' Action—Receiver and Manager—Preservation of Assets—Order giving Receiver and Manager leave to borrow and create First Charge on Assets — Loan by Bank — First Charge by Deed—Realization — Insufficient Assets — Receiver's Remuneration — Costs of Preservation and Realization—Priorities.

In an action by a debenture-holder on behalf of himself and all the other debenture-holders of a company to realize his security the usual judgment in a debenture-holders' action was pronounced and a receiver and manager was appointed. On the same day an order was made on the application of the plaintiff in the action authorizing the receiver to borrow 500*l.* to be secured by a first charge on the assets of the company in priority to the debenture-holders. The receiver borrowed the money from a bank, and the deed containing the charge did not in express terms exempt the receiver from personal liability to repay the loan. The receiver realized the whole of the assets comprised in the debentures, and there was in Court a fund which was insufficient to satisfy all the claims upon it. The bank claimed that subject to the costs of realization in the strict sense, they were entitled to be first paid out of the fund their charge, on the ground that the receiver, having borrowed the money from them, was their debtor, and that they were entitled to be subrogated to him in respect of his indemnity against the fund:—

Held, that the proper inference to be drawn from the transaction was that the receiver did not intend to pledge his credit and that the bank did not rely upon it, and therefore that there was no right of indemnity to which the principle of subrogation could apply.

Dictum of Cozens-Hardy L.J. in *In re Glasdir Copper Mines, Ld.*, [1906] 1 Ch. 365, 384, followed.

Held, therefore, that the fund must be applied, first, in payment of the plaintiff's costs of the action as between solicitor and client; secondly, in payment of the receiver's remuneration; and, thirdly, in repayment of the loan to the bank, so far as the balance of the fund would extend.

ADJOURNED SUMMONS.

A. Boynton, Limited, was a company formed for the purpose

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of carrying on the business of an hotelkeeper on certain leasehold premises known as "The Boynton's Hotel," 16 and 17, St. James's Place, St. James's, in the city of Westminster. The company had issued first mortgage debentures which were secured by a charge upon the property and assets of the company (except uncalled capital).

This action was commenced on April 3, 1908, by the plaintiff on behalf of himself and all other the holders of first mortgage debentures of the company to realize his security.

On April 14, 1908, the ordinary judgment in a debenture-holders' action was pronounced, and Lionel Henry Lemon was appointed the receiver and manager of the property and assets of the company, except uncalled capital, comprised in and subject to the securities and charges created by the debentures, and to receive the rents and profits of the company's leasehold premises, and the further consideration of the action was adjourned to chambers.

On the same day an order was made on the application of the plaintiff that the receiver should be at liberty to borrow a sum or sums not exceeding 500*l.* at a rate not exceeding 6*l.* per cent., and that the same should be a first charge on the assets covered by the debentures.

In pursuance of the latter order the receiver applied to Lloyds Bank for a loan of 500*l.* The bank thereupon caused a valuation of the furniture and other effects of the company to be made, and it appearing from such valuation that they were of the value of 3291*l.* 5*s.* 4*d.*, the bank made the advance to the receiver on the security of a deed of charge dated May 4, 1908. The deed, so far as material, was in the following terms. It was expressed to be made between L. H. Lemon, thereinafter called "the receiver," of the one part, and Lloyds Bank Limited, thereinafter called "the bank," of the other part, and after reciting the order of April 14, 1908, appointing the receiver, and the order of April 14, 1908, giving liberty to the receiver to borrow the 500*l.*, it recited that "whereas the bank at the request of the receiver made with such leave as aforesaid have agreed to lend to the receiver the sum of 500*l.* upon having the repayment thereof with interest at the rate hereinafter mentioned secured

in manner hereinafter appearing." Then it was witnessed "that in pursuance of the said agreement and in accordance with the leave so given as aforesaid and in consideration of the sum of 500*l.* paid by the bank to the receiver (the receipt whereof the receiver hereby acknowledges) the receiver as trustee hereby charges all the property and assets of the said A. Boynton, Limited (except uncalled capital), comprised in the said debentures so issued by the said A. Boynton, Limited, as aforesaid with the repayment on demand to the bank of the said sum of 500*l.* together with interest thereon at the rate of 5*l.* per cent. per annum to the intent that the charge hereby created shall be a first charge upon the said property and assets and in priority to all the debentures so issued by the said A. Boynton, Limited." The deed was executed by the receiver, but it contained no expression of personal obligation on his part to repay the money.

The receiver carried on the business of the company for rather less than a year and thereby made some profits. Ultimately, however, he became unable to pay the rent, and the lessors, by leave of the Court, distrained and seized the stock, furniture, &c., and on March 5, 1909, leave was given to the receiver to give up possession and to discontinue the business.

By an order dated March 22, 1909, and made upon the application of the bank to realize their security, it was ordered that the applicants should be at liberty to attend the proceedings on the footing that as from the date of the order they should be in the same position as if they had brought an action with the leave of the Court to realize their security and had obtained the appointment of the present receiver as their receiver.

There was a fund in Court of 600*l.* 8*s.* 6*d.*, which had been paid in by the receiver, representing the net result of the collection of the company's debts and the carrying on of the business by the receiver.

This was the hearing of the action on further consideration, adjourned from chambers into Court.

The question arising on the minutes was as to the order in which the plaintiff's costs, the receiver's remuneration, and the

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bank's loan were to rank against the fund in Court, which was insufficient to satisfy them all in full.

The company did not appear.

Clauson, for the plaintiff. The fund in Court has been realized and preserved by the action of the plaintiff, and he is therefore entitled in priority to all other parties to be paid out of the fund his costs of the action: *Wright* v. *Kirby* (1); *Batten, Proffitt & Scott* v. *Dartmouth Harbour Commissioners.* (2) The fund must therefore be applied, first, in payment of the plaintiff's costs; secondly, in payment of the receiver's remuneration; and, thirdly, in repayment of the bank's loan so far as the balance will extend: *Batten* v. *Wedgwood Coal and Iron Co.* (3); *In re London United Breweries, Ld.* (4)

F. Whinney, for Lloyds Bank. The bank are entitled to rank against the fund in Court next after the plaintiff's costs of realization in the strict sense, and before the receiver's remuneration, except for the short period during which the receiver is under the order of March 22, 1909, to be treated as their receiver. The money was lent to the receiver as an officer of the Court, and the fund has been realized by him by means of incurring this debt. The bank are therefore creditors of the receiver in respect of this debt, and if he had repaid them he would have been entitled to indemnify himself out of the assets of the company before the payment of any costs other than those of realization. That being the position, the bank are entitled to be subrogated to the receiver's right of indemnity in respect of their debt. The fact that as an additional security the Court sanctioned the giving of a particular charge on the assets of the company is in favour of the bank as shewing that without it they would only have been subrogated to the receiver's right of indemnity. In *In re Glasdir Copper Mines, Ld.* (5) and *Strapp* v. *Bull, Sons & Co.* (6) there were provisions expressly negativing the personal liability of the receiver. The plaintiff here, as representing the class, is really in the position of the bank's mortgagor. The bank is a stranger to the action.

(1) (1857) 23 Beav. 463.
(2) (1890) 45 Ch. D. 612.
(3) (1884) 28 Ch. D. 317.
(4) [1907] 2 Ch. 511.
(5) [1906] 1 Ch. 365, 382.
(6) [1895] 2 Ch. 1.

[WARRINGTON J. In *In re Glasdir Copper Mines, Ld.* (1) Cozens-Hardy L.J. seems to have thought that it made no difference whether the money was advanced by a party to the action or by a stranger.]

In *In re Glasdir Copper Mines, Ld.* (2) and *Strapp* v. *Bull, Sons & Co.* (3) the question was as to the receiver's right of indemnity. Here if the receiver had repaid the bank he would have been allowed the amount in his accounts as a proper outgoing: *Batten* v. *Wedgwood Coal and Iron Co.* (4); *In re Glasdir Copper Mines, Ld.* (5)

The receiver's remuneration comes after his ordinary outgoings. If the receiver leaves any creditor unpaid the Court will see that he is paid out of any fund in the receiver's hands: *In re London United Breweries, Ld.* (6) That case applies a fortiori where, as here, the money has been advanced to the receiver under an order of the Court: *Ex parte Grissell.* (7)

The bank being entitled, as it is submitted, to be subrogated to the receiver as regards his right of indemnity against the fund, the receiver cannot interfere with the security, but must keep it intact for the benefit of the bank.

Clauson was not called upon to reply.

Cur. adv. vult.

Feb. 12. WARRINGTON J. The question for decision arises on the further consideration of a debenture-holders' action. Money has by leave of the Court been borrowed by the receiver on the security of a first charge on the company's assets. The proceedings have not resulted in realizing enough to pay in full the plaintiff's costs of the action, the receiver's remuneration, and the amount due to those who lent the money. The plaintiff says that his costs and the receiver's remuneration ought to be paid first, and the balance only of the fund paid to the lenders in part discharge of their loan. The lenders say that the only charges which should come before them are the costs of realization and the remuneration of the receiver for the short period during

(1) [1906] 1 Ch. 384.
(2) [1906] 1 Ch. 365.
(3) [1895] 2 Ch. 1.
(4) 28 Ch. D. 317 323.
(5) [1906] 1 Ch. 383.
(6) [1907] 2 Ch. 511.
(7) (1875) 3 Ch. D. 411, 427.

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which he is under an order of the Court to be treated as their receiver. [His Lordship stated the facts, and continued.] Under the circumstances Lloyds Bank put forward the claim to priority above mentioned. They contend that they are creditors of the receiver in respect of a debt properly incurred by him; that he is entitled to indemnity out of the assets before any costs other than those of realization in the strict sense are paid; that under the principle of subrogation they are entitled to the benefit of his right of indemnity; and that he must pay his debts before he can take his remuneration.

The claim thus put forward by Lloyds Bank depends, in my judgment, on the assumption that the receiver is personally liable to them for the 500*l.*, because, unless he is so liable, he has no right of indemnity, and there would be nothing to which the principle of subrogation could apply. Is this assumption well founded? It is true that there is no express exclusion of the personal liability, but this is not conclusive if the right inference to draw from the transaction is that he did not intend to pledge his personal credit and the bank did not rely upon it. I think this is the right inference to draw. I should not hesitate to draw that inference from the nature of the transaction alone, and this view is supported by the judgment of Cozens-Hardy L.J. in *In re Glasdir Copper Mines, Ld.*(1) The Lord Justice says this: "Apart from authority, I think there is great force in the argument that when the Court has taken the administration of an undertaking into its own hands by means of an officer appointed to manage the undertaking, and finds it proper to procure money in order that the undertaking may be preserved or carried on to greater advantage with a view to ultimate realization, it can make no difference whether the person who finds the money is an outsider or is a party to the action." And then comes the important part: "No personal liability to repay is contemplated in either case. The lender gets only a charge on the undertaking; and I doubt whether he can, by virtue of such a charge, stop the business. My impression is that his only right is to have repayment out of the proceeds of the undertaking as and when realized. And it might well be held that any person advancing

(1) [1906] 1 Ch. 384.

money under these circumstances could not deprive the officer of the Court of his proper demand for work done and services rendered in the course of carrying on and winding up of the business." There is a certain qualification of that to which I will refer later. The Lord Justice's remarks as to personal liability are general in terms and were, I think, intended to be so. In the present case the recitals in the charge and the terms of the charge itself indicate that the bank were content to look to their security and to that alone, and that they were dealing with the receiver as a receiver and as an officer of the Court. The claim of the bank, therefore, to be treated as creditors of the receiver and entitled to the benefit of his right of indemnity fails.

What then is their position? They come in and take a charge upon the assets of a business which is in course of realization by the Court, and in my opinion they can take in satisfaction of their charge no more than that which is actually realized. The plaintiff has incurred his costs of the action, and the receiver has given his services, in the endeavour to realize as large a fund as possible for the benefit of the several persons having charges on it, and I think they are both entitled to be indemnified before the fund is applied in payment of these charges. The principle of *In re New Zealand Midland Ry. Co.* (1), in my opinion, applies, as does the latter part of the passage of the judgment of Cozens-Hardy L.J. read above. I think, therefore, that the plaintiff's costs of action as between solicitor and client and the remuneration of the receiver must first be paid, and the balance of the fund will be paid to the bank in part discharge of their debt.

The decision I have arrived at is in accordance with the views expressed by Stirling L.J. and Cozens-Hardy L.J. in *In re Glasdir Copper Mines, Ld.* (2) Stirling L.J. says this: "It seems to me plain, on the face of these orders themselves,"—the deed of charge does not say so here, but I think that is the true inference from it—"that the advances were made in order that the assets might be better or more advantageously realized by the receiver and manager. Thus the first order authorizes the borrowing 'for the purpose of preserving the property of the

(1) [1901] 2 Ch. 357.
(2) [1906] 1 Ch. 365, 383, 384.

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defendant company'; the second, 'to employ an engineer and mining captain to superintend the working of the defendants' mine, with a view to the preparation of a report to be used in procuring a purchaser for the said mine'; the third, 'for the purpose of the payment of expenses for keeping the mine free from water, payment of rent to the lessors, and for the maintenance of the mine'; and the fourth, 'for the payment of expenses for keeping the mine free from water, and for the maintenance of the mine.' Though the orders give liberty to create charges by way of security for the sums advanced, I do not think it was contemplated that those securities should be created in such a form as to confer an absolute right on the person making an advance to step in and himself realize the subject-matter of the securities whenever he thought proper. The securities created no personal liability and could not be enforced against the property charged (which was in the hands of an officer of the Court) without the leave of the Court; and it seems to me that the Court would not grant leave, unless a case was made out for putting an end to the management and realization of the property by the receiver. However, no application was made to enforce the securities, and the receiver was allowed to complete the realization of the property, which has turned out disastrously. In my opinion, the orders were made, and the securities given and taken, in the expectation of all parties that by means of the money advanced the receiver would be enabled to realize the property more advantageously—that is to say, in such a way as not only to repay the advances but to pay something to the debenture-holders. Things have turned out very differently; but inasmuch as the receiver, in my view, acted in the realization of the assets for the benefit of every one concerned, I think that he is entitled to indemnity out of the assets in priority to those for whose benefit he was acting." It is true that the judgment of Cozens-Hardy L.J. (1) contained the following passage, which immediately follows the passage from his judgment I have already read: "But, having regard to the observations of Lord Halsbury in *Strapp* v. *Bull, Sons & Co.* (2), which were concurred in by his colleagues, I do not feel at liberty

(1) [1906] 1 Ch. 384. (2) [1895] 2 Ch. 1.

to say that there is not a difference between the position of a stranger and that of the plaintiff." In *Strapp* v. *Bull, Sons & Co.* (1) and in *In re Glasdir Copper Mines, Ld.* (2) the advances had been made in the one case by persons who were creditors of the company, and in the other by the plaintiff in the action himself—but that is the meaning of the Lord Justice's observation. The observations of Lord Halsbury in *Strapp* v. *Bull, Sons & Co.* (3) to which Cozens-Hardy L.J. referred were as follows: "It is, in my opinion, hopeless to contend that the second debenture-holders, who were only brought into that position of being debenture-holders at all by this arrangement of the advance of the 5000*l.*, can be treated in two different capacities according to Mr. Bramwell Davis's argument, and that you are to look at them at one time as bankers advancing a sum of money, in which case they would be entitled to be paid their money at once without reference to what the result of the experiment might be, and, on the other hand, to look at them as second debenture-holders only, and in that capacity to be postponed to the first debenture-holders and to those who had advanced the 5000*l.*, that is to say, themselves. It seems to me that that is an impossible contention." And this is the important passage: "The blot throughout the whole of the judgment, as it appears to me, is that it treats these persons entering into this arrangement as if they were independent bankers advancing money from the outside. That is not the fact. They were persons who were buying their position as second debenture-holders by the advance of this money, and that seems to have been the theory on which the whole thing has been conducted. Under these circumstances I think that part of Vaughan Williams J.'s order is erroneous, and ought to be discharged, and that our declaration ought to be that these managers and receivers are entitled to the indemnity which they claim out of the funds." Lindley L.J. states the facts and says: "It seems to me impossible to say that the receivers and managers were not the receivers and managers of the unsecured creditors as much as they were receivers and managers of the first debenture-holders. They were receivers and managers of everybody

(1) [1895] 2 Ch. 1. (2) [1906] 1 Ch. 365.
(3) [1895] 2 Ch. 6, 7.

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interested in the success of the company. If we once get to that, and if we once get the persons who advanced this 5000*l.* out of the category of strangers, having rights prior to the debenture-holders, and prior to the receivers and managers, it is obvious that the receivers and managers must be entitled to their indemnity, and to their costs, charges and expenses which they are prima facie entitled to. Here it is that we differ from Vaughan Williams J. The learned judge, who had to construe these orders to which I have referred, has construed them as leaving the persons who advanced this 5000*l.* in the position of strangers. I think that that is not their true position." I think by those remarks the two learned judges were doing no more than guarding themselves against being supposed to have decided more than the facts there warranted. However this may be, on the facts of this case I hold that the bank have the rights I have above expressed and no more.

Solicitors: *Spyer & Sons; Eardley Holt, Lightly & Co.*

W. I. C.

ELLIS *v.* KERR.

[1909 E. 559.]

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Feb. 15.

Contract—Parties—Covenant by Covenantor with himself and others—Joint Right to enforce Obligation—Validity.

By a marriage settlement W. W. K. assigned to the trustees a policy of assurance to be held upon the trusts of the settlement; and he, T. D. B., and C. J. K. (two of the trustees of the settlement) covenanted with the trustees to keep the policy on foot and pay the premiums. A new trustee was afterwards appointed in the place of one who retired; and the policy and the right to enforce the covenant were vested in T. D. B., C. J. K., and E. H. E. (the new trustee) as joint tenants. W. W. K. made default in payment of the premiums, and T. D. B. and C. J. K. refused to continue making the payments personally. E. H. E. brought an action against W. W. K., T. D. B., and C. J. K., the covenantors, for a declaration that they were jointly and severally liable to pay the premiums, and for an order on them to do so. T. D. B. and C. J. K. raised a point of law, asking for a declaration that the covenant was void so far as regarded them by reason of their being named therein both as covenantors and covenantees, and that the action might be dismissed:—

Held, that the covenant was void and the action must be dismissed.

De Tastet v. *Shaw*, (1818) 1 B. & Al. 664, and *Boyce* v. *Edbrooke*, [1903] 1 Ch. 836, followed.

Rose v. *Poulton*, (1831) 2 B. & Ad. 822, explained.

By a marriage settlement of June 21, 1898, made between Walter William Kerr of the first part, Evelyn Mary Ellis, spinster, of the second part, Sir A. E. A. Ellis of the third part, the Honourable Lady M. F. Ellis, of the fourth part, T. D. Butler and C. J. Kerr of the fifth part, and the said T. D. Butler, C. J. Kerr, and W. H. Chetwynd "(which three last-named persons are hereinafter called the trustees)" of the sixth part, W. W. Kerr assigned to the trustees a policy of assurance on his own life for the sum of 15,000*l.* effected with the Alliance Assurance Company subject to an annual premium of 305*l.* 12*s.* 6*d.*, and the said sum of 15,000*l.* thereby assured and all other moneys to become payable thereunder by way of bonus or otherwise; and it was declared that the trustees and the survivors or survivor of them and the executors and administrators of such survivor, their or his assigns, or other the

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trustees or trustee for the time being of the settlement (thereinafter called the trustees or trustee) should stand possessed of the net moneys to arise from the policy upon the trusts therein mentioned. The settlement contained the following covenant on which the question now in dispute arose: "And the said W. W. Kerr T. D. Butler and C. J. Kerr do and each of them doth hereby covenant with the trustees that he the said W. W. Kerr if the said intended marriage shall be solemnized will not by any act or omission cause or allow the policy hereby assigned or any policy substituted therefor as hereinafter provided to become void or voidable and that they the said W. W. Kerr T. D. Butler and C. J. Kerr or some or one of them their or some or one of their heirs executors or administrators will during the life of the said W. W. Kerr from time to time duly pay all money payable for keeping on foot the said policy or any policy substituted as aforesaid or for restoring the same respectively if and when voidable And if any such policy shall become void will effect on the life of the said W. W. Kerr a new substituted policy or policies with such office and in such names or name as the trustees or trustee shall direct and for an amount equal to the sum which would have been payable under the void policy if it had not become void and the said W. W. Kerr had then died And will deliver and if necessary also assign every such substituted policy and deliver the receipt for every such payment to the trustees or trustee And the said W. W. Kerr T. D. Butler and C. J. Kerr and each of them their and each of their heirs executors or administrators will not do or suffer any act or thing by means whereof the trustees or trustee may be prevented from receiving any money assured by any policy whether original or substituted subject to the trusts of these presents."

The marriage was solemnized on June 22, 1898. In 1899 the policy was allowed to lapse, and in substitution for it W. W. Kerr effected in the names of T. D. Butler, C. J. Kerr, and W. H. Chetwynd as trustees of the settlement a policy on his own life for 15,000*l.* dated February 20, 1899, and subject to half-yearly premiums of 148*l.* 4*s.* 5*d.* each. By a deed of December 14, 1906, the Honourable E. H. Ellis was appointed a trustee of the settlement in the place of W. H. Chetwynd, who

retired; and the policy and the right to enforce the covenant were vested in T. D. Butler, C. J. Kerr, and E. H. Ellis as trustees of the settlement, and as joint tenants, for the purposes and upon the trusts thereof.

W. W. Kerr made default in payment of the premiums on the policy and was adjudicated a bankrupt. From 1904 to 1908 the premiums were paid by T. D. Butler and C. J. Kerr personally, but they refused to make any further payments, and E. H. Ellis brought this action against W. W. Kerr, T. D. Butler, and C. J. Kerr for a declaration that the defendants were jointly and severally liable to pay the premiums, and for an order on them to pay those which fell due in August, 1908, and February, 1909, with interest and the fines for non-payment thereof. By their defences T. D. Butler and C. J. Kerr alleged that they had been induced to enter into the covenant, if at all, by misrepresentation. They gave notice of trial of a question of law under Rules of the Supreme Court, Order xxv., r. 2, asking for a declaration that the alleged covenant sued on was void and created no cause of action so far as regarded them by reason of their being named therein both as covenantors and covenantees, and that the action might be dismissed with costs or all further proceedings therein be stayed.

Upjohn, K.C., and *Sylvain Mayer*, for the defendants Butler and C. J. Kerr. The covenant is void inasmuch as the same persons are both covenantors and covenantees. There is nothing to divide it and make it a covenant with any of the trustees separately. This is simply an action on the covenant and it ought to be dismissed; but that will not prevent the plaintiff from taking proceedings for making the defendants liable on other grounds. A man cannot covenant or contract with himself, and an action on such a contract could not formerly have been maintained in a Court of law: *De Tastet* v. *Shaw* (1); *Faulkner* v. *Lowe*. (2) A man cannot sue himself, and the rule is the same in Courts of Equity: *Boyce* v. *Edbrooke*. (3) The circumstance that other persons are joint contractors is immaterial:

(1) 1 B. & Al. 664. (2) (1848) 2 Ex. 595.
(3) [1903] 1 Ch. 836.

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Moffat v. *Van Millingen* (1); *Mainwaring* v. *Newman* (2); *Neale* v. *Turton* (3); *Teague* v. *Hubbard.* (4) This is not like cases in which the Court allows one of several trustees to bring an action and make the other trustees defendants so that they may be bound by the order, as in *Luke* v. *South Kensington Hotel Co.* (5) It is a question not of form, but of substance; not of the failure of a trustee, whereupon the Court may intervene, but the failure of the trust property itself. This covenant never could have been enforced; therefore the property never existed, and the Court cannot be asked to protect it.

H. Terrell, K.C., and *W. M. Cann*, for the plaintiff in the action. It is true that at law a man cannot be both plaintiff and defendant and that an action will not lie on a contract in which the same person is covenantor and covenantee; but that is a mere matter of form; the covenant exists although it cannot be sued on: *Rose* v. *Poulton.* (6) No doubt the covenant in that case was joint and several, but it was treated as a joint covenant, and the decision shews that the legal defect is one of form. Then equity steps in to assist the covenantees who are trustees and to prevent a defect of form from destroying the trust estate. Such a covenant is available in equity: *Bosanquet* v. *Wray.* (7) There appears to be no case in which the legal defect has actually been held to be a ground for allowing a man to sue in equity; but all the cases proceed on the basis that the debt remains and there is a right to sue in equity though not at law: *Piercy* v. *Fynney.* (8) One of two joint promisees can maintain an action on the contract, making the other joint promisee a co-defendant if, after tender of an indemnity against costs, he refuses to be joined as a co-plaintiff: *Cullen* v. *Knowles.* (9) That is allowed in order to bind him by the judgment and because it cannot be done at law. One of several trustees can do the same thing: *Luke* v. *South Kensington Hotel Co.* (5) In the present case if the Court appointed new trustees of the settlement they could sue on the

(1) (1754) 2 Bos. & P. 124, note (c).
(2) (1800) 2 Bos. & P. 120.
(3) (1827) 4 Bing. 149.
(4) (1828) 8 B. & C. 345.
(5) (1879) 11 Ch. D. 121.
(6) 2 B. & Ad. 822, 829, 830.
(7) (1816) 6 Taunt. 597, 605.
(8) (1871) L. R. 12 Eq. 69.
(9) [1898] 2 Q. B. 380.

covenant even at law. The property secured by the covenant is trust property subject to the settlement. It is a chose in action of which the trustees of the settlement are trustees; and it ought not to be lost to the cestuis que trust because as a matter of form they cannot sue at law. The Court of Chancery never allows trust property to fail.

Upjohn, *K.C.*, in reply. This is not a matter of form but of substance. The covenant is void ab initio; consequently there never was any trust property to which any right of action could attach. In every case in which Courts of Equity have interfered there has been some equitable right outside and beyond the alleged covenant. In *Rose* v. *Poulton* (1) the covenant was joint and several and the action was brought on the several covenant, so that case has no application here. *Bosanquet* v. *Wray* (2) is in our favour. In *Cullen* v. *Knowles* (3) and *Luke* v. *South Kensington Hotel Co.* (4) there were good contracts to start with. If Courts of Equity always interfered to remedy such defects as these *Boyce* v. *Edbrooke* (5) must have been decided the other way.

WARRINGTON J. stated the facts, and continued:—On the part of the plaintiff it is admitted that at law, before the fusion of law and equity by the Judicature Act, such an action as this could not have been maintained; but he says the objection to that action would have been a merely formal objection, and the person who was thereby prevented from suing at law might have sued—and he must say this—in the same form of action in a Court of Equity. Now I want to guard myself, and counsel for the applicants have guarded themselves, against being supposed to say that a decision in favour of the applicants in this case, though it would put an end to the present action, which is merely an action on the covenant, would entirely conclude the question whether in some other form of proceedings these two defendants may or may not be liable to somebody. The only question that I am asked to determine is whether they are liable

(1) 2 B. & Ad. 822.
(2) 6 Taunt. 597.
(3) [1898] 2 Q. B. 380.
(4) 11 Ch. D. 121.
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to the plaintiff on this covenant. It is important to bear that distinction in mind, because in an action founded on what are called in one of the cases which I shall refer to presently equitable considerations there may be a defence also on equitable considerations which might not be available as a defence to an action such as this is, merely an action on the covenant.

After saying that, I come back to the question which I have to determine, which is, Can this action, as an action merely on the covenant, be maintained in this Court, which, of course, is now administering principles both of common law and of equity? The substance of the objection is that a man cannot make a contract with himself. One would have thought it only required to be stated to be self-evident that it makes no difference that he joins in that contract with himself some other person either as covenantor or covenantee, if the obligation on the one side, or, as the case may be, the right to enforce that obligation on the other side, is joint. In the present case the right to enforce the obligation is unquestionably a joint right. It is vested in the three persons with whom it is made as joint tenants, and the action is brought in supposed enforcement of that right against two of the persons in whose favour it is created. The main argument on the part of the plaintiff is that this objection is not substance but form; and it is that that requires to be examined.

The case is dealt with, I think, with the greatest possible clearness, and it arose in the neatest possible way, in *De Tastet* v. *Shaw*. (1) Stated in its simple form, the question there arose in this way. A claim was made against the defendants Benjamin Shaw, Stephen Nicholson Barber, and Elizabeth Houstoun, the executors and executrix of James Henry Houstoun, and it was pleaded that by a deed made between James Henry Houstoun of the first part, Sir John Perring, Benjamin Shaw, Barber, and James Henry Houstoun himself of the second part, and one Oliver Vill of the third part, James Henry Houstoun covenanted with Perring, Shaw, Barber, and himself (James Henry Houstoun) to pay certain sums of money which were due from himself to the partnership firm, of which Perring, Shaw, Barber, and himself

(1) 1 B. & Al. 664.

were the partners, and they pleaded the right to retain that debt. Now, to put it concisely, the debt in respect of which they pleaded that right was a debt arising out of a covenant by their testator with himself and two other persons, and the question was whether that obligation created a debt or not. It was not a matter of form, it was in that case entirely a matter of substance. It was not a question whether a claim could be defeated, because the proper persons were not parties to it, or could not be made parties to it. The question was whether there was or was not an existing debt in respect of which the right to retain it could be exercised. Lord Ellenborough C.J. says in his judgment (1): "The question is, whether the debt secured by this deed may or may not be pleaded in this action as a specialty debt"—the action was an action on a simple contract, and the executors had pleaded the right to retain a specialty debt—"or by way of retainer, two of the creditors under it being two of the executors of the debtor. And we are of opinion that it cannot. The testator, who was a partner in a house of trade, was indebted on his individual account to the partnership, that is to himself and others. The debt existing, but its amount being unascertained, he executed the deed in question, whereby he covenanted with himself and his partners to pay the debt;"—it was a joint account—"upon this deed no action could have been maintained in a Court of law against the testator himself while living, or against his executors after his decease, even if all the executors had been strangers to the partnership"—that is to say, the joint debt, the debt owing to three persons jointly, could not have been recovered in an action at law by the two survivors of those two joint tenants against the executors of the deceased one—"and therefore the deed upon which the defendants rely, does not shew any debt at law." That is, it was not merely a defect in the procedure in form, but there was no debt at law, there was no obligation between the parties which would be effective at law on that deed. He goes on to say: "But it was contended that it shews a debt in equity, and that a Court of law ought to take notice of such a debt and give effect to it. It is obvious, however, that justice cannot be administered without

(1) 1 B. & Al. 669.

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affording the plaintiff an opportunity of controverting the amount of the debt; and the only mode in which a fact can be controverted in an action at law, viz. by taking an issue to be tried by a jury, is impracticable in the present case; because the debt constitutes an item in a partnership account, and the partnership account must be taken in order to ascertain how much was due at the execution of the deed, and whether the sum then due has been reduced in any and what degree by the intermediate gains of the partnership business." In other words, there was no debt which could be enforced in equity on the covenant as such, but the transactions, of which the giving of that covenant was one, in themselves constituted a debt which could be enforced in equity through the medium of taking partnership accounts; but he none the less decides that at law the covenant could not be sued upon, and he does not say, as the plaintiff here contends, that that covenant could be sued upon in equity. What could be sued upon in equity was a different obligation altogether. It was not the obligation on the covenant, but the debt to be enforced by the medium of taking the partnership accounts. Now the result of that case, I think, is plainly to determine that as a matter of substance an obligation by a man to pay himself, or to pay himself and another, is one which is in fact not an obligation in the eye of the law.

Now, is there any ground for saying that such an obligation is one which in itself, and by itself, would be enforced in equity? As throwing some light upon that question I think the judgment of Farwell J. in *Boyce* v. *Edbrooke* (1) is of great importance. *Boyce* v. *Edbrooke* (1) is this: a tenant for life in pursuance of the powers of the Settled Land Act granted a lease to himself and others as lessees, and the lease contained a covenant by the lessees—that is, by the lessor and two other persons—to pay the rent and perform the obligations of the lease, and the question which Farwell J. had to determine was whether that lease was a valid lease under the Settled Land Act, 1882. One of the objections to the lease was that the lessees had not covenanted with the lessor to pay the rent and to perform the other obligations of the lease; in other words, that one of the

(1) [1903] 1 Ch. 836, 841.

conditions to the validity of a lease by a tenant for life required by the Settled Land Act had not been fulfilled. That objection rested upon the contention that the apparent obligation by covenant created by the terms of the deed was in fact no obligation at all, although it was not denied that there might have been in equity a corresponding obligation. Farwell J. says on that point: "The Act of Parliament requires that 'such a demise do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit.' Now the lease is by the tenant for life to himself and two others. It is argued that the covenants are joint and several. I have done my best to spell a several liability out of the document, but I am wholly unable to do so, and I do not think the Court is at liberty to alter the plain words." Then he deals with that point which I need not trouble about, and further on he says this: "Now when the Act of Parliament mentions 'covenant' it means a legal covenant which can be sued upon at law, and not some right which might, or might not, arise from equitable considerations; but if this is a joint covenant, no action could have been brought upon it at law, at any rate while the lessor lived. As was said by Best C.J. in *Neale* v. *Turton* (1), 'There is no principle by which a man can be at the same time plaintiff and defendant.'" Then he refers to the case of *Mainwaring* v. *Newman*. (2) I need not read that part through. The point of the judgment is that he considered that the covenant in that case was not such a legal covenant as was meant by the Act of Parliament. Now if the objection to that covenant was merely a matter of form, one which if it were raised before the Judicature Act would have no weight in a Court of Equity, is it possible that the learned judge would have held that such a defect as that would have prevented the covenant from being a covenant within the meaning of the Act? It seems to me that that cannot have been his view, and that the view he took was that the covenant in itself created no obligation, that the lessor or the reversioner would have had to go outside it and find some equitable considerations, the existence of which he might or might not be able to prove,

(1) 4 Bing. 149, 151.

(2) 2 Bos. & P. 120.

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so that his right to relief would have depended on these considerations, and not on the mere production of the covenant.

I think, therefore, that both those cases, *De Tastet* v. *Shaw* (1) and *Boyce* v. *Edbrooke* (2), establish that the objection taken by the two applicants in the present case is not one of form but of substance, and that there never was as part of the trust estate in this case any such chose in action as would be created by an effective covenant by the defendants to pay the premiums on this policy of insurance, and, therefore, there was nothing in which the beneficiaries under the settlement could ever have had any equitable interest. There could, of course, be no equitable interest in that which did not exist.

Some trouble was caused to myself by the citation by Mr. Terrell, in support of his contention that the objection was one of form only, of the case of *Rose* v. *Poulton*. (3) The point in support of which he cited that case was that though the covenant by one person with three persons, of whom he was one jointly, could not be sued upon at law, the difficulty was merely one of form, and if that defect of form were got rid of, then he might be sued. The conclusion sought to be drawn from that, of course, is that there was a legal debt—although Lord Ellenborough says there was not—but that the right of action was merely suspended until some event should happen which would remove the defect of form.

Now it is necessary to look a little closely at *Rose* v. *Poulton* (3) to see whether it decides any such thing, because I think it is clear that it does not, and in fact that it does not touch the point at all. Now in *Rose* v. *Poulton* (3) the facts were these. Three persons, Joseph Poulton, Charles Poulton, and James Gurney, entered into a certain covenant with William Rose, his wife Frances Rose, who was dead at the date of the action, a man named White, and James Gurney. The covenant by Joseph Poulton, Charles Poulton, and James Gurney was a joint and several covenant, that is to say that each of the covenantors was liable to be sued separately. It is most important to bear that in mind. On the other hand the covenantees were entitled

(1) 1 B. & Al. 664. (2) [1903] 1 Ch. 836.
(3) 2 B. & Ad. 822.

also to enforce the covenant separately. It was a covenant with Rose, his wife, White, and Gurney jointly and severally. The wife was dead and Gurney was dead. The action was brought by Rose and White, that is, two of the joint covenantees with whom the several covenants were entered into, against the executors of Joseph Poulton; that is, the obligation sought to be enforced was the separate obligation of Joseph Poulton. To that action an objection was taken that James Gurney, one of the covenantors, was also a covenantee. Now, if that objection could be relied upon as an objection to this action, it is obvious that the defendants must have gone so far as to say that not only was there no joint obligation, because the same person was covenantor and covenantee, but there was no separate obligation, and that defect in their argument is pointed out directly the argument is started by Lord Tenterden C.J. and by Parke J. Lord Tenterden C.J. says (1) "The covenant is joint and several. Why should not any of the covenantees sue alone?" There he is looking at it from the point of view of the covenantees, that is to say that the benefit of it is joint and several. Parke J. immediately takes it up and he says "or all the covenantees sue a single covenantor?" and that is the case with which the Court was dealing on that occasion. Therefore, when you look carefully at those observations, Lord Tenterden C.J. is putting the answer to the objection from the point of view of the covenantee and Parke J. is putting it from the point of view of the covenantor. Now the judgments seem to me to go at greater length upon exactly the same grounds as those which are put thus by the two learned judges in the argument. It is pointed out that the action is brought on a covenant, which is a several covenant, against one of the covenantors, that Gurney would not be a party on both sides of the record to that action even if he were alive, and therefore there would be no objection to the action even if Gurney were alive, and that still less could there be any objection to that action now that he was dead, because the action would be brought then by the two surviving joint covenantees. But it does not touch the point which I have to

(1) 2 B. & Ad. 827.

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decide, inasmuch as, for the purpose of enforcing that covenant, whether Gurney, who was both covenantor and covenantee, were alive or dead did not matter one bit, inasmuch as, whether he were alive or dead, his name would not appear as plaintiff and defendant. It seems to me that this is a complete answer in so far as that particular case is concerned to any argument founded upon its applicability.

But there is one other point. The plaintiff went so far as to say that the objection raised here is so much a matter of form that equity would always have interposed to prevent such a matter of form being a bar to relief. No authority has been cited in support of that proposition. It is perfectly true that authorities have been cited in support of the well-known practice and doctrine in the Court of Chancery, that if a covenant is entered into with two persons jointly by a third person, and one of those joint covenantees refuses to sue at law, the Court will allow one of them to sue the covenantor, making his co-covenantee a party to the action. But that seems to me to depend upon a perfectly well-known principle of equity, and to arise, as do so many equitable principles, out of the doctrine of trusts. I think it arises from this notion, that if a covenant to pay a sum of money is made with two jointly, each of them is trustee for the two and for the other, and if one as such trustee refuses to join in the action which in all honesty he is bound to bring for the benefit of his co-covenantee, then his co-covenantee is entitled to make him a party to the action in order that he may be bound, and to recover the moneys secured by the covenant. It seems to me that that is the principle upon which those cases depend. In this case there is no such principle which can be applied. It is idle to my mind to say that because these people are trustees for somebody else this form of action can be allowed. The answer to it is that if they are trustees for somebody else they are trustees of something which never had any existence, and the object of this action is to assert that that which never had any existence does in fact have an existence. Such an action seems to me impossible.

Therefore on that ground I must give judgment on this point of law in favour of the defendants. The action must be dismissed

without prejudice to any action which may be brought against these two defendants founded on an obligation arising otherwise than on the covenant.

Solicitors: *Harteup, Davis & Cobbold; Cutler & Allingham.*

H. C. R.

In re EDWARDS. LLOYD *v.* BOYES.

[1909 E. 697.]

Settlement of Real Estate—Condition subsequent requiring Assumption of Name and Arms—Gift over on "refusal or neglect" to assume—Infant.

Testator by his will devised and appointed real estate, in strict settlement, and added a proviso directing that every person who should become entitled under his will to the estate as tenant for life or tenant in tail in possession who should not then bear the name and arms of Edwards should within six calendar months after he should have become so entitled in possession assume the surname and arms of Edwards. And in case any such person should "refuse or neglect" within the six calendar months to take, use, and bear such surname and arms, then and in every such case immediately after the expiration of the six months the limitation thereinafter contained to the use of such person should absolutely determine, and the testator gave the estate to the person or persons next in remainder under the limitations of his will.

On the assumption that a previous tenant for life had forfeited the estate by reason of her non-compliance with the proviso and that the estate had thereupon devolved upon an infant who also had not complied with the proviso:—

Held, that the words "refuse or neglect" in the proviso involved an exercise of will, and that inasmuch as in law an infant had no power (except in certain special cases) to exercise a discretion in reference to a legal matter, the testator in using those words must be taken not to include an infant.

Held, therefore, that the proviso did not apply to the infant, and that, on the above assumption, he had not forfeited the estate by reason of his "refusal or neglect" to comply with it.

Partridge v. *Partridge*, [1894] 1 Ch. 351, applied.

But *held*, on the construction of the particular provisions of the will, that the previous tenant for life had never become a "tenant for life in possession" within the meaning of the proviso, and therefore that

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the period at which it became incumbent upon her to assume the surname and arms had not arrived, and consequently that she had not forfeited the estate.

ADJOURNED SUMMONS.

Under the limitations of a settlement dated July 27, 1872, certain freehold estates situate in the parish of Great Ness and elsewhere in the county of Salop, at the date of the will next hereinafter stated, stood limited to the use of the testator George Rowland Edwards for life, and from and immediately after his death to such uses in favour of his children and issue as he should appoint.

By his will, dated July 2, 1891, and a codicil thereto, dated May 24, 1893, the testator, in exercise of the powers conferred on him by the settlement, limited and appointed the estates to the use of trustees for a term of 999 years upon certain trusts for the benefit of his unmarried daughters and subject thereto upon trust to accumulate the surplus rents and profits for a period of twenty-one years from his decease. Subject to the term the testator settled the estates to the use of his son Henry Charles Edwards for life, with remainder to the use of his first and every other son born within the testator's lifetime or within twenty-one years after his decease successively according to seniority in tail male, with remainder to the use of his eldest daughter, Antoinette Charlotte Boyes, for life, with remainder to the use of her first and every other son born in the testator's lifetime or within twenty-one years after his decease successively according to seniority in tail general, with remainder to similar uses in favour of his second daughter, Catherine Edwards, and her issue, with remainder to the use of his third daughter, Louisa Mary Bayly, for her life, with remainder to the use of her first son, Charles Cecil Paget Bayly, and every other son of the said Louisa Mary Bayly born in the testator's lifetime or within twenty-one years after his decease successively according to seniority in tail general, with remainder to his fourth daughter, Eleanor Margaret Edwards, and every other subsequent daughter for her life, and after her decease to the use of her first and every other son born in the testator's lifetime or within twenty-one years after his decease successively according to seniority in tail general

and so that the elder of such daughters and her first and other sons successively might be preferred to and take before the younger of such daughters and their first and other sons respectively, with divers remainders over and an ultimate remainder to the use of the said Henry Charles Edwards, his heirs and assigns, for ever. The will contained the following proviso :—

"Provided always and I hereby direct and appoint that every person who shall become entitled under this my will to the said hereditaments and premises hereinbefore appointed as tenant for life or tenant in tail in possession who shall not then bear the surname and arms of Edwards shall within six calendar months after he or she shall have become so entitled in possession assume the surname and arms of Edwards and apply for and endeavour to obtain a Royal licence or other proper authority for that purpose. And if the person so becoming entitled shall be a female and shall marry then her husband shall within six calendar months after she shall have become entitled in possession as aforesaid or after his marriage (which shall last happen) assume the surname and arms of Edwards and apply for and endeavour to obtain a Royal licence or other proper authority for that purpose. Provided also and I hereby further direct and appoint that in case any such person shall refuse or neglect within the said six calendar months to take use and bear such surname and arms or to take such steps as aforesaid or shall at any time afterwards discontinue to use and bear such surname and arms then and in every such case immediately after the expiration of the said six calendar months or immediately after such discontinuance as aforesaid as the case may be if the person who or whose husband shall so for the time being refuse neglect or discontinue as aforesaid shall be (either by himself or herself or together with her husband) tenant for life, the limitation hereinafter contained to the use of such person and his or her assigns during his or her life shall absolutely determine and if the person who or whose husband shall so for the time being refuse neglect or discontinue as aforesaid shall be tenant in tail male or in tail then the limitation under which such person shall be tenant in tail male or in tail shall absolutely determine and in the said

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respective cases the said hereditaments and premises hereinbefore appointed and settled shall immediately go to the person or persons next in remainder under the limitations herein contained in the same manner as if such person being tenant for life were dead or being tenant in tail male or in tail were dead and there were a general failure of issue inheritable under such limitation in tail male or in tail respectively."

The testator died on March 3, 1894, and his will and codicil were duly proved by the executors therein named.

Henry Charles Edwards died on January 26, 1896, without leaving male issue.

Catherine Edwards died on December 8, 1904, unmarried.

Louisa Mary Bayly died on March 25, 1909, having had issue two sons, namely, Charles Cecil Paget Bayly, born in 1885, and Frank Boscawen Bayly, born in 1891.

On the death of H. C. Edwards the testator's daughter Mrs. Antoinette Charlotte Boyes succeeded to the estates. She was now about sixty-two years of age and had had no issue.

Neither Mrs. Boyes nor C. C. Bayly nor F. B. Bayly had assumed the surname and arms of Edwards.

The trustees had entered under the term, and the period of accumulation of the surplus rents and profits had not yet expired.

This was an originating summons taken out by the surviving trustees and executors of the will and codicil asking that it might be determined upon the true construction of the will and codicil, and particularly of the name and arms clause contained in the will, who was now entitled as tenant for life or in tail to the estates settled by the will and codicil.

The question was first argued whether, on the assumption that the estates had by virtue of previous forfeitures devolved upon Frank Boscawen Bayly, an infant, as tenant in tail in possession, he had forfeited them by "refusing or neglecting" to assume the surname and arms of Edwards.

Sargant, for the summons.

Cave, K.C., and *J. S. Green,* for the infant F. B. Bayly. The name and arms clause does not apply to an infant until

he comes of age. The assumption of a name and arms involves an exercise of volition which in law an infant is incapable of exercising. The case is covered by *Partridge* v. *Partridge*. (1) It is true that was not a case of "refusal or neglect" to assume a name and arms, but of "refusal or neglect" to comply with a condition as to residence, but the reasoning of North J. in his judgment applies equally to the former as to the latter case. In that case there was a name and arms clause, but the question as to the necessity for compliance with it by the infant was not argued.

[WARRINGTON J. There is a difference between a condition precedent and a condition subsequent. If the condition is a condition precedent the infant must comply with it.]

No doubt if an infant does not fulfil a condition precedent he does not get the estate. There is, however, no general rule that an infant can perform a condition which is for its benefit. The condition here is a condition subsequent. *Bevan* v. *Mahon-Hagan* (2), which will no doubt be cited against us, was clearly a case of a condition precedent. [They also referred to Vaizey on Settlements, p. 1272, Simpson on Infants, 3rd ed. p. 11, and *Doe* v. *Yates*. (3)]

[WARRINGTON J. referred to Simpson on Infants, 3rd ed. pp. 69, 70.]

L. W. Byrne, for the testator's unmarried daughters. I admit that the condition here as to the assumption of the name and arms is a condition subsequent. Where that is so, and the condition is one that an infant can perform, it is a question of fact in each case whether the infant has been guilty of laches in complying with it. If he has the estate is forfeited. It would of course be absurd to contend that an infant of two or three years of age could "refuse or neglect" to comply with such a condition as the present, but the case would be different if the infant were a young man of nineteen years of age.

[WARRINGTON J. referred to *Partridge* v. *Partridge*. (1) Can a person who can exercise no volition be said to "neglect or refuse"?]

(1) [1894] 1 Ch. 351.
(2) (1891) 27 L. R. Ir. 399; (1893) 31 L. R. Ir. 342.
(3) (1822) 5 B. & Al. 544.

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In that case it was held that an infant could not be said to "refuse or neglect" to reside in a particular place because the persons to whom his legal custody and care were committed did not choose that he should reside in that place. There was no voluntary act of the infant. An infant can assume a name and arms—*Bevan* v. *Mahon-Hagan* (1)—at any rate if of years of discretion. He can equally "refuse or neglect" to do so. An infant may be guilty of laches in not performing a condition—that is, he may "neglect" to perform a condition: Co. Litt. 246b and 380b. There is nothing in the words used by Coke to confine his statements to conditions precedent, as North J. appears in *Partridge* v. *Partridge* (2) to have thought there was. Lord Hardwicke in *Hearle* v. *Greenbank* (3) says: "At common law an infant might have performed a condition; that is a condition for his benefit: so he might make a feoffment for his benefit: as if he had an estate on condition to make a feoffment of part of it to J. S. or else lose the whole estate." This refers to a condition subsequent, for the infant must be seised of the whole before he can enfeoff another of a part.

Scot v. *Haughton* (4) shews that an infant is bound by a condition attached to a gift. The infant could have performed this condition, but neglected to do so, and the estates ought to go over.

Sargant referred to *Whittingham's Case.* (5)

WARRINGTON J. In this case the first question I have to decide arises upon the true construction and effect of the name and arms clause contained in the testator's will. For the purposes of this I will assume, though certainly not deciding it, that the estates, by virtue of previous forfeitures, vested in an infant, the defendant Frank Boscawen Bayly, as tenant in tail in possession. On that assumption the question is whether he has forfeited the estates by neglecting to take and use the surname and arms of Edwards. He has not in fact assumed that surname and arms, but the question is whether, notwithstanding that he has not done so, he has forfeited the estates.

(1) 27 L. R. Ir. 399; 31 L. R. Ir. 342.
(2) [1894] 1 Ch. 359, 360.
(3) (1749) 1 Ves. Sen. 299, 304.
(4) (1706) 2 Vern. 560.
(5) (1603) 8 Rep. 42b, 44b.

Now the name and arms clause is in these terms: [His Lordship read the first part of the clause, and continued:—] So far, that is merely a direction as to what the person in question shall do after he has become entitled to the estate. It is not a condition annexed as a condition precedent to his estate, but it is a condition subsequent to the vesting of his estate. Then comes the provision which gives effect to his direction. [His Lordship read the second part of the clause, and continued:—] The question is whether that clause, which is a clause of forfeiture on breach of a condition subsequent, the breach of which forfeits an estate actually vested, is a condition which applies to an infant. The infant in this case, on the assumption which I have made, succeeded to the estates some considerable time ago, and more than the six months from the date on which he succeeded to the estates has now elapsed. But can it be said that in the case of an infant he has refused or neglected to do the act which is in question?

I think it is quite sufficient for the purpose of deciding the present case to examine the decision of North J. in *Partridge* v. *Partridge* (1) and see whether the grounds of that decision apply to such a case as the present. It is necessary to examine the grounds of that decision because it does not in terms apply to a case of forfeiture on the breach of a condition contained in a name and arms clause. In that case the condition was a different one, and I therefore have to consider whether the principle of that case applies to the present condition. In *Partridge* v. *Partridge* (1) the facts were these: A testatrix devised real estate, including a mansion-house, in strict settlement, and added a proviso directing that every person who, by virtue of the limitations thereinbefore contained, should become entitled to the possession or to the receipt of the rents of the estate should, within three months next after the death of the first tenant for life, reside in and occupy the mansion-house for nine months at the least in every year. And in case any person who should come into possession or receipt of the rents of the estate should "refuse or neglect" to reside in and occupy the mansion-house, then the limitation thereinbefore contained of the estate to the

(1) [1894] 1 Ch. 351.

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use of him or her so refusing or neglecting should cease, and the testatrix gave the estate to the person or persons next in remainder under the limitations in her will. In that case North J. held that, inasmuch as an infant had no power to choose his own place of residence, an infant who had become entitled under the will to the possession of the estate could not, if he did not reside in the mansion-house, be said to "refuse or neglect" to do so, and consequently that he was not bound by the condition, and the gift over could not take effect. There was in that case a forfeiture clause which was to take effect on any person becoming entitled to the possession or to the receipt of the rents and profits of the real estate refusing or neglecting to take the surname and assume the arms of the testatrix, but the learned judge did not decide whether his view with regard to residence would apply to the name and arms clause. But I think, when his judgment is examined, that the principle of it will be found to apply as much to a name and arms clause as to the clause with regard to residence. In his judgment he first considers the construction of the particular clause, and it is unnecessary for me to read that part of his judgment because it is not in point in the present case. The material part of his judgment begins at p. 358. He there says this: "I now come to consider the final clause—the gift over. That clause must have a fair construction put upon it, and, unless when so construed it imposes upon one of the parties the obligation of doing something, the omission of which has the effect of taking the estate away from him, the estate will not be taken away." Then he deals again with the construction of the particular clause, with which I do not think I need deal. Then he goes on and says: "What, then, is the effect of the clause? It is said that it does not apply to an infant. The plaintiff, who came into possession on the 7th of June, 1893, is now about fourteen, and John Francis Partridge having died on the 7th of June, 1893, more than three months have elapsed since that time, and therefore the question is, whether the infant plaintiff was bound within those three months to enter into occupation of the house, and to continue to reside there for nine months in every year. In my opinion, the plaintiff was not

bound to do this, and he is entitled to the estate. As I pointed out just now, the effect of these limitations is not to give him the estate on condition that he resides and occupies the house, but they are expressed as taking away the estate from him if he does not fulfil the condition, and we must see on what precise event the estate is to go over." Pausing there for one moment—so far, with a mere change of necessary words, those remarks of the learned judge apply exactly to the present case. The effect in the present case is not to give the infant the estates on condition that he takes the name and bears the arms, but it is to take away the estates from him if he does not fulfil the condition. Then the learned judge goes on: "The only event mentioned is, if the person who becomes entitled to the estate 'refuses or neglects' to reside in the house; and an infant cannot 'refuse or neglect' to reside in a particular place if the persons to whom his legal custody and care are committed do not choose that he shall do so. The words are not if he 'omit' to reside, or if he 'does not reside,' but if he 'refuse or neglect' to reside; and, in my opinion, an infant, who cannot control or fix the place where he is to reside, cannot within the terms of this clause be said to 'refuse or neglect' to reside at the place mentioned; and for this reason also the clause does not apply to the infant plaintiff during his infancy. It is conceded, and indeed I think it is clear, that no distinction can be drawn by reason of the tender years of the infant. I cannot see any reason why an obligation, which clearly could not possibly exist at the age of two, should arise at the age of ten, or fifteen or twenty. I cannot draw any line during the period of legal infancy; and if an infant is not bound by the obligation at one time, no infant is bound by it up to the time at which he attains twenty-one." Then the learned judge, referring to certain authorities which had been cited to him, says: "As regards this question, the passages which have been referred to in Coke upon Littleton seem to me in point. At p. 246b, Coke says, having spoken first of all of a married woman: 'And so it is of an infant; his laches, for not performing of a condition annexed to a state, either made to his ancestor or to himselfe, shall barre him of the right of the land for ever.' That is, if there is a condition

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precedent which he ought to, and does not, perform, he will be barred by reason of its not having been performed." Then he cites another passage: "The other passage, at p. 380b, is still more instructive. There the proposition of Littleton is: 'No lachesse shal be adjudged in the heire within age'; and then Coke proceeds: 'Laches, or Lasches, is an old French word for slacknesse or negligence, or not doing. And the rule (that no negligence shall be adjudged in an infant) is true, where he is thereby to be barred of his entrie in respect of a former right, as by a discent; or of his former right (as Littleton doth here put an example), by a warrantie where his entrie is congeable. But otherwise it is of conditions, charges and penalties going out of or depending upon the originall conveyance, for the laches or negligence shall be adjudged in those cases as well in the infant as any other.'" I think that that last passage cited from Coke upon Littleton applies to conditions annexed to the estate, that is, to conditions precedent and not to conditions subsequent the breach of which would entail the forfeiture of an estate already vested. Then the learned judge refers to a case in Ireland of *Bevan* v. *Mahon-Hagan* (1), in which it had been held that an infant was bound by a condition precedent. In my opinion it is quite plain that the condition in that case was a condition precedent, and therefore that case does apply to the present one.

What then is the true construction and effect of this clause, which is that "in case any such person shall refuse or neglect within the said calendar months to take use and bear such surname and arms," and so on? Supposing this infant had—which is quite possible—become entitled to the estates as tenant in tail in possession a few days after his birth, could it by any possibility be said that an infant of that age had "refused or neglected" to do the act in question? The expression "refuse or neglect" involves the idea of some exercise of discretion, some exercise of will, on his part. It seems to me beside the question to say that his parents or guardians or any person having control of him might have taken the name for him. The clause has nothing to do with that. It says "in case any such person

(1) 27 L. R. Ir. 399.

shall refuse or neglect." Following the judgment of North J., again, if an infant of such tender years as those to which I have just referred cannot be said to have "refused or neglected," it is impossible to draw the line at any particular period of his infancy at which it may be said that it was possible for him to "refuse or neglect." It might be said that an infant of five years old, if the matter was explained to him, might choose to be called by a certain name, but I think what the learned judge says is plainly correct, that, for the purposes of the construction of a will, if once you arrive at the result that an infant of tender age cannot be said to be pointed at in the clause, then the same result must apply whatever may be the age. I think the true view is that on the construction of this clause the expression "refuse or neglect" involves the exercise of his will by the infant. In law an infant has no power to exercise his will, except in certain special cases with which I need not deal, and he has no power to do that which involves discretion or the exercise of his will in reference to legal matters. I think, therefore, that when the testator in this case refers to "refusal or neglect" by a person he must be taken not to include an infant in the class of persons who in his view can "refuse or neglect." It seems to me, therefore, that the infant, assuming him to have succeeded to the estates, has not forfeited them by reason of the fact that he is not now, and was not within the six months, known by the name of Edwards.

The question was then argued whether Mrs. Boyes, who became entitled to the estates on the death of Henry Charles Edwards, the first tenant for life, in 1896, had forfeited them by reason of her neglect to assume the surname and arms of Edwards in accordance with the provisions of the name and arms clause.

Sargant, for the summons.

H. Terrell, K.C., and *F. Whinney*, for Mrs. Boyes.

Rowden, K.C., and *W. R. Sheldon*, for Charles Cecil Paget Bayly.

Cave, K.C., and *J. S. Green*, for Frank Boscawen Bayly.

L. W. Byrne, for the testator's unmarried daughters.

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Dighton Pollock, for the testator's married daughters.
G. Hildyard and *J. F. W. Galbraith,* for other parties.

WARRINGTON J. held upon the construction of the will, and particularly having regard to the sense in which the testator had used the expression "in possession" in the various clauses of his will, that Mrs. Boyes did not in 1896 and had never yet become a person entitled as tenant for life in possession within the meaning of the name and arms clause, and therefore that the period at which it was incumbent upon her to assume the surname and arms of Edwards had not arrived, and consequently that she had not forfeited the estates, but was now entitled to them as tenant for life subject to the term.

Solicitors: *Chester, Broome & Griffithes, for Peele & Peele, Shrewsbury; Rawle, Johnstone & Co., for Harrisons & Winnall, Welshpool; Bartlett & Large; A. Tyler.*

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[1909 S. 4036.]

Common Lands—Lands taken for Public Undertaking—Compensation for Extinguishment of Commonable Rights—Payment to de facto Committee—Application by Committee to Board of Agriculture and Fisheries—Dispute as to proper Constitution of Committee—Action to determine Persons interested in Compensation—Jurisdiction of Court—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 102, 103—*Inclosure Act,* 1852 (15 & 16 *Vict. c.* 79), *s.* 22—*Inclosure Act,* 1854 (17 & 18 *Vict. c.* 97), *ss.* 15, 16, 17—*Commonable Rights Compensation Act,* 1882 (45 & 46 *Vict. c.* 15).

Where under the Lands Clauses Consolidation Act, 1845, and the Inclosure Acts, 1852 and 1854, common lands have been taken for a public undertaking and a committee of commoners has been appointed to receive and has received the compensation payable in respect of the extinguishment of commonable rights, the Board of Agriculture and Fisheries have jurisdiction to entertain an application by the committee under s. 22 of the Act of 1852, without entering into any question as to the appointment or constitution of the committee. It is sufficient that the committee is a de facto committee.

A motion in an action against a de facto committee of commoners by persons suing on behalf of themselves and all other commoners for

payment into Court of compensation money in the hands of the committee on the ground that such committee was not properly constituted was dismissed for want of jurisdiction.

MOTION.

The action was brought by William Salmon and Alfred Stone on behalf of themselves and all other the persons who were entitled to commonable, lammas, or other rights over Sewardstone Marsh, Broken Marsh, and Patty Pool, all in the parish of Waltham Holy Cross, Essex, at the date of the extinction of those rights, and who were entitled to and interested in the compensation paid by the Metropolitan Water Board for such rights against five persons who purported to be and were de facto a committee under the Lands Clauses Consolidation Act, 1845. The writ claimed distribution of the fund among the persons who should be found entitled, and also included a claim for inquiries with a view of ascertaining who were the persons so entitled to the fund. The notice of motion asked for an order directing the defendants to pay into Court to the credit of the action the fund, which amounted to about 4300*l.*, and for an order directing the inquiries asked for by the writ.

The facts were these: In 1905 the Metropolitan Water Board, who had succeeded to the undertaking of the East London Waterworks Company, desired to take, for the purposes of that undertaking, the marshes over which the rights in question existed, and also to acquire and extinguish those rights. Accordingly, under the provisions of the company's special Act and of the Lands Clauses Consolidation Act, 1845, which was incorporated therewith, the Water Board on July 10, 1905, issued a notice requiring all persons having or claiming to have these rights to attend a meeting on August 1, 1905, for the purpose of appointing a committee of their number (not exceeding five) to negotiate and agree with the Water Board as to the amount of compensation to be paid by the Water Board for the extinction of such rights. At the meeting held on August 1, 1905, the defendants, who were five of the persons present at the meeting, were appointed to be a committee.

Negotiations took place between the committee and the Water Board, and in 1907 the money payable for compensation was

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ascertained and paid to the defendants as such committee. Nothing had since been done by the committee with reference to the application of the money so paid.

On December 15, 1909, the writ in the present action was issued, and on January 18, 1910, notice of the present motion was given.

On February 2, 1910, a majority of the defendants resolved to and did in fact apply by a letter of that date to the Board of Agriculture and Fisheries (1) (hereinafter referred to as the Board) to take action under s. 22 of the Inclosure Act, 1852. The Board by their letter in reply, dated February 8, 1910, stated that they were advised that they were not in a position to deal with the application pending the decision of the Court in the action which appeared to raise the question of the validity of the meeting which appointed the committee and of the qualification of the members of the committee as "parties entitled" within the meaning of s. 103 of the Lands Clauses Consolidation Act, 1845.

The motion now came on for hearing.

R. H. Hodge, for the motion. Sect. 99 of the Lands Clauses Consolidation Act, 1845, provides that the compensation for the extinction of commonable rights shall be determined and paid in the manner provided by the Act and that upon payment of such compensation the commonable rights shall cease and be extinguished. Sect. 101 provides that the compensation to be paid shall be determined by agreement between the promoters of the undertaking and a committee of the "parties entitled" to commonable rights in the lands taken. By s. 102 the promoters are empowered to convene a meeting of the "parties entitled" to the commonable rights for the purpose of their appointing a committee to treat with the promoters for the compensation to be paid, and by s. 103 the meeting is empowered to appoint a committee, not exceeding five in number of the "parties entitled" to such rights. By s. 104 the committee

(1) By the Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), the title of the Board of Agriculture was changed to "the Board of Agriculture and Fisheries."

may agree with the promoters as to the amount of the compensation to be paid, and s. 107 provides that on payment of the compensation so agreed the lands are to vest in the promoters freed and discharged from all commonable rights.

In the present case the plaintiffs' contention is that there is a question whether the meeting and the committee appointed by it were properly constituted. Under s. 102 the meeting is to be of the "parties entitled," and under s. 103 the persons appointed to be the committee are to be "parties entitled" to the commonable rights in question.

[WARRINGTON J. The contention on the other side I understand is that it is not necessary to the exercise of the jurisdiction conferred on the Board by s. 22 of the Inclosure Act, 1852, that the committee should be properly constituted, but that it is sufficient if the persons forming it are prima facie entitled.]

It is submitted that only a properly constituted committee can exercise the powers conferred upon a committee by the Act of 1845 and the Inclosure Acts of 1852 and 1854. Unless the committee are "parties entitled" to the commonable rights they cannot act on behalf of the other commoners. It would lead to unjust results if a committee, the members of which were not entitled to these rights, were to exercise their powers contrary to the wishes of the persons who were entitled to them. In the present case only one member of the committee is a member of the class which the plaintiffs allege to be entitled to the rights. The remaining four are members of a class claiming adversely to the class which the plaintiffs represent.

It is more convenient that the question as to the proper constitution of the committee should be determined by the Court rather than by the Board, which have not the machinery for that purpose. The Board have refused to deal with the question during the pendency of the present action, and matters are now at a deadlock.

T. H. Carson, K.C., and *E. J. Naldrett*, for the defendants. The proper and only tribunal to deal with the present case is the Board: *Richards* v. *De Winton*. (1) That case went to the Court

(1) [1901] 2 Ch. 566.

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of Appeal on another point (1), but the decision of Kekewich J. on this point remains unaffected.

Even if there be a question whether the defendants were entitled to the commonable rights, it is now too late to raise the objection that they, as a committee, were not properly appointed. According to the plaintiffs' own evidence the meeting was duly convened by the promoters and the committee were appointed at the meeting. They negotiated with the promoters and received the compensation money, and no question can now be raised as to their position.

But if it is not too late to do so, then it is submitted, on the construction of the Lands Clauses Consolidation Act, 1845, and the Inclosure Acts, 1852 and 1854, that that objection cannot prevail. The earlier proceedings were under the Act of 1845, and having regard to the provisions of that Act the meeting was a good one. It was properly convened by the promoters under s. 102 of the Act, and the Board cannot determine the right of the persons to be present at the meeting. There is no machinery in the Act for that purpose: see Cripps on Compensation, 5th ed. p. 271. If they could, the Act would be unworkable, for the attendance at the meeting of one person who was afterwards shewn not to be entitled would invalidate the whole proceedings. Further, the committee was a good one. It was elected by the "meeting so called": s. 103. Then under the Inclosure Act, 1852, under which the committee applied to the Board, the committee must be taken to be a good one. The Act contains no machinery enabling the Board to make an initial inquiry into title. As regards dealing with the compensation money it is to be observed that under that Act only the income can be dealt with. The only power which the Board have to distribute capital is under the Inclosure Act, 1854, which contains ample powers for ascertaining title. Sect. 12 of that Act constitutes all the Inclosure Acts one code.

There is no machinery in the Acts of 1845, 1852, and 1854 for ascertaining in the earlier stages of the proceedings who are the "parties entitled," and it is submitted that on the true view of those Acts those words are there used as meaning the parties

(1) [1903] 1 Ch. 507.

prima facie entitled. If that were not so the money would probably in every case, instead of being paid to the committee, be paid into the bank under s. 107 of the Act of 1845. It is submitted, therefore, that the Board is entitled to entertain the present application as the application of the de facto committee and is not concerned to enter into any question as to its appointment or constitution.

The action is misconceived and the motion ought to be dismissed.

R. H. Hodge in reply. The Court ought to construe the words "parties entitled" in the Acts strictly. It would be a large gloss to put upon those words to say that they meant "parties claiming to be entitled." No doubt promoters may deal with a de facto committee if their constitution is not challenged.

[WARRINGTON J. There is nothing to prevent the committee from proceeding under the Inclosure Act, 1854. They have never given up their right to do so under that Act.]

There is no machinery under which the commoners can compel the committee to proceed under that Act. My submission is that the committee must be members of the class of parties who are entitled.

[WARRINGTON J. The fund is not yours unless it is ascertained under the Act of 1845.]

It may turn out as the result of the inquiries asked for that the committee are properly constituted.

[WARRINGTON J. The Board have no power to determine who are the persons interested until after the first meeting.]

It is manifest that the Legislature contemplates an investigation of title by the Board in other cases besides that provided for by the Act of 1854. If they call the meeting as requested under the Inclosure Act, 1852, or if in pursuance of a request of the committee they call a meeting under the Inclosure Act, 1854, or under the Commonable Rights Compensation Act, 1882, in each case it is expressly provided that it is the decision of the majority in number and "the majority in respect of interest" of the persons present at the meeting which prevails. To ascertain a majority in interest necessarily involves an inquiry into

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the title. An inquiry directed by the Court would be of the utmost assistance to the Board.

WARRINGTON J. stated the nature of the action and the object of the motion, and continued :—It is objected on the part of the defendants that this Court has no jurisdiction to entertain the action, and therefore ought not to make any order on the motion. They say that, under the legislation which deals with these matters, the proper tribunal and the only tribunal competent to dispose of the fund is the Board who now represent the Inclosure Commissioners under the Inclosure Acts. The plaintiffs say that in the present case the Board have no jurisdiction, or, at any rate, it is a question whether they have jurisdiction, and that that question must first be determined by the Court, and the suggestion is that the committee is no committee at all within the meaning of the Lands Clauses Consolidation Act, 1845, and the Inclosure Acts, 1852 and 1854, and, therefore, is not authorized to make an application to the Board, and that if they are not authorized to make the application the Board have no jurisdiction to deal with it, or if they are not in fact a committee,—and there is a question whether they are so or not,—that question ought first to be decided by the Court.

The question turns mainly on the provisions of s. 99 and the following sections of the Lands Clauses Consolidation Act, 1845. Sect. 99 provides (reading it shortly) that the compensation in respect of all commonable and other rights in or over the lands referred to, including therein any commonable or other rights to which the lord of the manor may be entitled, other than his right in the soil of such lands, shall be determined and paid and applied in manner thereinafter provided with respect to common lands the right in the soil of which shall belong to the commoners. Then s. 101 provides that the compensation to be paid with respect to any such lands the right to the soil of which shall belong to the commoners, as well as the compensation to be paid for the commonable and other rights in or over common lands the right of the soil whereof shall not belong to the commoners, other than the compensation to the person entitled to the soil, shall be determined by agreement between the

promoters of the undertaking and a committee of the parties entitled to commonable or other rights in such lands, to be appointed as next thereinafter mentioned. Then by s. 102 it is enacted that "It shall be lawful for the promoters of the undertaking to convene a meeting of the parties entitled to commonable or other rights over or in such lands to be held at some convenient place in the neighbourhood of the lands," and then there are details as to the notices which are to be given, and so on, which I need not read. Then by s. 103: "It shall be lawful for the meeting so called to appoint a committee, not exceeding five in number, of the parties entitled to any such rights; and at such meeting the decision of the majority of the persons entitled to commonable rights present shall bind the minority and all absent parties." Then the Act provides (s. 104) that the committee may agree with the promoters for the compensation, and (s. 105) that disputes may be settled as in other cases of disputed compensation, and contains a provision (s. 106) for the mode of ascertaining the compensation if there is no effectual meeting or if such meeting fails to appoint a committee; but I do not think I need read any more of the provisions of that Act. That was followed up, first by the Inclosure Act, 1852, s. 22 of which provides that, "Where any money shall have been or may hereafter be paid to a committee under the Lands Clauses Consolidation Act, 1845, or under any railway or other special Act by which money may have been directed or authorized to be paid to a committee, as compensation for the extinction of commonable or other rights, or for lands being common lands or in the nature thereof, the right to the soil of which may have belonged to the commoners, and such committee shall be of opinion that the provisions of such Act for the apportionment thereof cannot be satisfactorily carried into effect, such committee may make application in writing to the commissioners to call a meeting of the persons interested in such compensation money for the appointment of trustees of such compensation money, and for the investment thereof, and for the application of the interest and annual produce thereof to such purposes for the benefit of the persons interested therein as the commissioners shall

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approve; and if the said commissioners shall think fit to proceed with such application they shall call a meeting accordingly, and the decision of the majority in number and the majority in respect of interest of the persons present at such meeting shall bind the minority and all absent parties." The section then provides that if no instructions are resolved upon, or in case the commissioners shall deem such instructions unjust or unreasonable, they may make an order for the investment of the compensation money and for the application of the income thereof as they shall think fit. Those provisions, as will be seen, only enable the meeting or the commissioners to direct the investment and the application of the income of the money. That was carried further by the Inclosure Act, 1854, s. 15 and the following sections. Sect. 15 provides that "Where any money shall have been or may hereafter be paid to a committee under the Lands Clauses Consolidation Act, 1845," following the words of s. 22 of the Act of 1852, "and the majority of such committee shall be of opinion that the provisions of such Act for the apportionment thereof cannot be satisfactorily carried into effect, such majority may make application in writing to the commissioners to call a meeting of the persons interested in such compensation money, to determine whether or not such compensation money shall be apportioned under the provisions of this Act." Sect. 16 provides that if the meeting resolves upon apportionment the money is to be paid into the Bank of England. Then comes s. 17: "As soon as the said monies shall have been paid into the bank as aforesaid, the said Inclosure Commissioners, or any assistant commissioner appointed or to be appointed by them for that purpose, shall proceed to ascertain, determine, and award the names of the parties who were entitled to such estates, rights, and interests in the said common and commonable lands, and the amount or value of their respective shares, rights, and interests therein, and the proportionate amount of the price so to be paid as aforesaid for such estates, rights, and interests to which each party so entitled as aforesaid is entitled, in respect of his share, right, or interest as aforesaid." The section then provides that the award shall be binding on all parties and contains elaborate machinery for the purpose of ascertaining who

are the persons interested in the compensation money. I need not read those provisions in detail, but elaborate provisions are inserted under which the commissioners (now the Board) can ascertain the persons amongst whom the money is to be divided. But there is one important point to notice—that, whereas in s. 15 the duty of the Board is to call a meeting of the persons interested, the machinery for ascertaining who are the persons interested does not come into operation until after that meeting has resolved upon the apportionment of the compensation money. There is further provision in the Commonable Rights Compensation Act, 1882, to which I need not refer, enabling the Board, where the majority of the parties desire it, to apply the money to certain public purposes instead of apportioning it amongst the individuals.

The facts in the present case are these: [His Lordship stated the facts, substantially as above set forth, down to the application of the committee on February 2, 1910, to the Board under s. 22 of the Inclosure Act, 1852, and continued:—] So far the committee have not determined to proceed under the Inclosure Act, 1854, but they have done nothing, so far as I can see, to preclude themselves from so proceeding. The answer by the Board to that application was (giving the effect of it) that, inasmuch as there was an action pending before this Court, the Board were not satisfied that they might not do something that might conflict with the order of this Court, and they therefore suggested that they should stay their hands until the Court had dealt with the matter. Under those circumstances the present motion is brought on, and the plaintiffs' case for payment into Court and for the relief which they ask by the notice of motion is that matters have arrived at a deadlock, and that, unless the Court interferes, the money will never be apportioned at all.

The ground on which the plaintiffs say that matters have arrived at a deadlock is this. They say: "There is a question whether the so-called committee is—and we, the plaintiffs, assert that it is the fact that the so-called committee is not—a committee under the Lands Clauses Consolidation Act, 1845, because the members of it were, as we say, not of the number of the parties entitled to the commonable or other rights." Their case

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is that certain persons are the "parties entitled" to the commonable rights, and that the five members of the committee are not included in that class. That is the first point. If that point is out of the way, then I am bound by the decision of Kekewich J. in *Richards* v. *De Winton* (1), in which he held that, under the Lands Clauses Consolidation Act, 1845, the two Inclosure Acts of 1852 and 1854, and the Commonable Rights Compensation Act, 1882, the only tribunal having jurisdiction in such matters is the Board, and that the Court had no jurisdiction to entertain, and would refuse to entertain, the action which was then before him, which was similar to the action now before me. In that case I should be bound by that decision, and I propose to say nothing about it. But the point which I have to determine is whether the Board have jurisdiction at all in the present case, where it is suggested that this so-called committee, purporting to act under the Lands Clauses Consolidation Act, 1845, is not such a committee. For that purpose I think the question really turns on the construction of the Inclosure Acts of 1852 and 1854 and not on the construction or effect of the provisions of the Lands Clauses Consolidation Act, 1845. In my opinion the real question is, What is meant in s. 22 of the Inclosure Act, 1852, by the words "Where any money shall have been or may hereafter be paid to a committee under the Lands Clauses Consolidation Act, 1845, or under any railway or other special Act," and so on? Do they mean "shall have been paid or may hereafter be paid to persons acting as a committee under those Acts" —a de facto committee—or is it necessary in every case that the Board before they accede to an application of a committee under the section should determine whether the persons making it are or are not in reality a committee? I say nothing about a case of fraud, or a case in which there is some misdoing by reason of which persons who have no title at all have become possessed of compensation money and then purport to apply as a committee under the Lands Clauses Consolidation Act, 1845. I put all such cases as those out of the way, but, in the absence of any such case, I think the true construction of the Inclosure Act, 1852, the subsequent Inclosure Act, 1854, and the Commonable

(1) [1901] 2 Ch. 566.

Rights Compensation Act, 1882, is this—that, if persons have got moneys in their hands which have been paid to them under the machinery of the Lands Clauses Consolidation Act, 1845, the jurisdiction of the Board arises, and that it is not necessary for the Board to consider whether there is any defect in the appointment of those persons purporting to act as a committee. Just consider what enormous inconveniences would otherwise arise. The plaintiffs must put their case so high as this—that, if one person attended the original meeting and voted thereat who was not really a person entitled to compensation, or, to put a less strong case, if it should be ultimately shewn that one of the persons appointed on the committee was not in fact a person so entitled, the whole proceedings would be void from the beginning. In my opinion the Legislature cannot have intended any such result as that. It must, it seems to me, have been intended that the persons acting as a committee, who had actually negotiated with the promoters and had actually received the money, and who would deal with the money but for the difficulty which they felt, compelling their resort to the Board, should be treated for the purpose of these Inclosure Acts as being in reality the committee under the Lands Clauses Consolidation Act, 1845. If I am right in that, then the jurisdiction of the Court is ousted in this case, as it was in the case of *Richards* v. *De Winton* (1), and I ought to refuse to make any order on the motion. I think the best mode, inasmuch as it is desired to satisfy the Board as to their jurisdiction, will be to make the order in this form: "This Court, being of opinion that the Board of Agriculture and Fisheries have jurisdiction to deal with the application of the defendants dated February 2, 1910, under the Inclosure Act, 1852, or any subsequent application by them under the Inclosure Act, 1854, or the Commonable Rights Compensation Act, 1882, doth not think fit to make any order on the motion, except that the costs thereof be costs in the action."

Solicitors: *Masterman & Everington; Billing & Co., for Jessopp & Gough, Waltham Abbey.*

(1) [1901] 2 Ch. 566.

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Feb. 24, 25.

In re PULLEN.
PARKER *v.* PULLEN.

[1910 P. 138.]

Revenue—Estate Duty—Testamentary Expenses—Insufficient General Personal Estate to pay Duty—Specifically bequeathed Personalty—Undisposed of Realty—Order of Administration of Assets—Marshalling—Finance Act, 1894 (57 & 58 *Vict. c.* 30)—*Land Transfer Act,* 1897 (60 & 61 *Vict. c.* 65).

Estate duty, which under the Finance Act, 1894, is payable in respect of personal property specifically bequeathed by a testator, being a testamentary expense, is payable in the same order of administration as other testamentary expenses are payable, and accordingly where the residuary personal estate is insufficient to pay the estate duty on the specifically bequeathed personalty the heir-at-law is not entitled to have the duty paid out of such personalty in exoneration of the undisposed of realty.

Shepheard v. *Beetham,* (1877) 6 Ch. D. 597, distinguished.

Adjourned Summons.

James Mathew Pullen, by his will dated February 21, 1894, specifically devised two freehold houses, one of which he charged with certain annuities which far exceeded its value. He also gave certain directions as regards a large number of leasehold houses which the Court decided amounted to a specific bequest of those leaseholds to his son James Pullen and his daughter Eliza Lucy Pullen as tenants in common, and he specifically disposed of his household effects. And the testator appointed his son James Pullen and Henry Charles Parker executors and trustees of his will.

The testator died on August 1, 1901, and his will was duly proved by the executors therein named on October 28, 1901.

The testator's son James Pullen, who was also his heir-at-law, died on June 30, 1909, having by his will, dated March 18, 1903, appointed John Witcomb and Ebenezer Newman executors thereof, who on August 3, 1909, duly proved the will.

The testator's estate consisted of the freeholds, leaseholds, and household effects specifically devised and bequeathed as above mentioned, and also of other freehold property, of the net value

of 2608*l.* after deducting the mortgages upon it, not disposed of by the will, and certain personal estate valued for probate at 2089*l.* 7*s.* 6*d.*, which was also not disposed of by the will.

The gross value of the estate was 112,656*l.* 10*s.* 3*d.*, and the net value, after deducting funeral and testamentary expenses and unsecured debts and certain mortgage debts secured on various parts of the estate, was 49,801*l.* 13*s.* 6*d.*

The testator's funeral and testamentary expenses and debts (including estate duty on personalty, but not including mortgage debts or estate duty on the real estate) amounted to 4873*l.* 7*s.* 1*d.*, thus exceeding the value of the personalty not specifically bequeathed by 2783*l.* 19*s.* 7*d.*

The proportional part of the estate duty in respect of the value of the specifically bequeathed personalty according to the probate value thereof, and after deduction made in respect of mortgages thereon, amounted to 2439*l.* 0*s.* 4*d.*

This was an originating summons taken out by H. C. Parker, the surviving executor of the will, for the determination (inter alia) of the question whether (having regard to the fact that the residuary or undisposed of personal estate was insufficient to pay the testator's funeral and testamentary expenses and debts) the estate duty attributable to and payable in respect of specifically bequeathed personalty was wholly payable out of the undisposed of real estate, or whether the same or any and what part thereof was payable out of the personalty comprised in the respective specific bequests and in what proportions.

J. M. Gover, for the summons.

Humphrey H. King, for the personal representatives of James Pullen, the testator's heir-at-law. The rules as to the order of administration of assets do not apply as regards realty in the case of estate duty. There is no authority for charging realty with deficiency of estate duty on personalty. In *Shepheard* v. *Beetham* (1) it was held that specifically bequeathed personalty must exonerate the real estate from probate duty. That decision applies to estate duty, which now takes the place of probate duty, and is governed by the same principles. By s. 8, sub-s. 1, of the

(1) 6 Ch. D. 597.

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Finance Act, 1894, "The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act and so far as the same are applicable, apply for the purposes of collection, recovery, and repayment of estate duty." The incidence of estate duty imposed by that Act is governed by the same principle as that which regulated the incidence of the old probate duty: *In re Bourne* (1); *In re Hadley.* (2) The Land Transfer Act, 1897, has not affected the incidence of estate duty. By s. 5 of that Act, "Nothing in this part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof"; and s. 2, sub-s. 3, enumerates the liabilities to which real estate is subject, but contains no reference to duty of any kind except so far as included in "testamentary expenses." It is true that now under that Act a devisee or heir-at-law cannot enjoy the property until after the will is proved or administration granted; but if before that Act the heir-at-law was not bound to contribute to the payment of the estate duty on specifically bequeathed personalty he is not bound to do so now. The observations of Lindley M.R. in *In re Maryon-Wilson* (3) as to the incidence of settlement estate duty apply, mutatis mutandis, equally strongly to this case. The Finance Act, 1894, has carefully safeguarded the heir and the specific devisee, defining their liability by s. 9, which relates to the duty on realty. Sect. 6, sub-s. 2, which makes the payment by the executor of estate duty in respect of realty optional, also shews that the Legislature distinguished between the liability for estate duty in respect of personalty and that in respect of realty. The status quo before the Act is to be preserved, and what that is is stated by Malins V.-C. in *Shepheard* v. *Beetham.* (4) The marshalling must be from the beginning, and no increased burden is now to be placed on the realty. The Finance Act, 1894, must be construed as at the date of its passing, apart from the provisions of the Land Transfer Act, 1897: *In re Palmer.* (5) It will no doubt be

(1) [1893] 1 Ch. 188, 192.
(2) [1909] 1 Ch. 20, 22.
(3) [1900] 1 Ch. 565, 570.
(4) 6 Ch. D. 603.
(5) [1900] W. N. 9.

contended that the payment of estate duty is a testamentary expense; but so was probate duty, as was held by Malins V.-C. in *Shepheard* v. *Beetham* (1) and in *Davies* v. *Fowler*. (2) Estate duty is, it is submitted, an extraordinary expense. In *In re Sharman* (3) it was held, following *In re Palmer* (4), that estate duty payable in respect of real estate was not a "testamentary expense" within the meaning of a direction contained in the will of a testator, who died after the Land Transfer Act, 1897, for payment of his debts and funeral and testamentary expenses out of his personal estate, and that the decisions of *In re Clemow* (5) and *In re Treasure* (6) had no reference to real estate. There is nothing, therefore, it is submitted, to make the heir liable to pay this estate duty.

Horace Freeman, for Eliza Lucy Pullen, one of the specific legatees of the personalty. *In re Maryon-Wilson* (7) was not a decision as to estate duty, but as to settlement estate duty, and the grounds on which that case was decided do not apply to estate duty. Estate duty is a single duty imposed on the testator's estate generally, and is not apportionable between particular parts of the estate, except in so far as the Legislature has provided that a rateable part thereof is to be borne by property which does not pass to the executor as such. That is clearly recognized by the decision in *In re Hadley* (8): see particularly the remarks of Fletcher Moulton L.J. (9) The argument derived from the incidence of settlement estate duty does not therefore apply to estate duty. *Shepheard* v. *Beetham* (1), upon which reliance has been placed, is a decision on the old probate duty and prior to the Land Transfer Act, 1897, but, assuming it to have been rightly decided, it does not govern the present case. It dealt only with probate duty; but there is no distinction between probate duty or estate duty and other testamentary expenses. The only text-book in which that case with reference to duty is cited or referred to is Theobald on Wills, 7th ed. p. 803. The Vice-Chancellor in that

(1) 6 Ch. D. 597.
(2) (1873) L. R. 16 Eq. 308.
(3) [1901] 2 Ch. 280.
(4) [1900] W. N. 9.
(5) [1900] 2 Ch. 182.
(6) [1900] 2 Ch. 648.
(7) [1900] 1 Ch. 565.
(8) [1909] 1 Ch. 20, 22.
(9) [1909] 1 Ch. 32, 33.

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case bases his judgment on the heir of having to pay duty for the proof of a will under which he could have no interest. The ground of that decision has now disappeared. True it may still be said that the heir-at-law does not take under the will, but he is concerned with the payment of estate duty, which is a necessary preliminary to the grant of probate or administration, for he must make his title through the personal representatives. The law has been altered in this respect since *Shepheard* v. *Beetham* (1) by Part I. of the Land Transfer Act, 1897; the result of that Act is to make the heir-at-law as much concerned with proving the will as the next of kin is: *In re Vickerstaff* (2); and compare *In re Shaw.* (3) As regards the hardship on the heir, see the remarks of Lord Hardwicke in *Galton* v. *Hancock.* (4) Moreover, it is equally a hardship on the specific legatee that the estate duty should be thrown upon his specific legacy. In giving a specific legacy the testator shews an intention that the specific legatee should not have the value of his gift diminished by payment of funeral and testamentary expenses and debts: *Robertson* v. *Broadbent.* (5) If this duty is thrown on the specific legatees the result will be to deprive them of part of the bounty which the testator intended for them. The undisposed of realty is just as much part of the testator's estate as the specifically bequeathed personalty, and he must be supposed to have contemplated the possibility of its being resorted to, if necessary, to give effect to his intended bounty to the specific legatees. Apart from *Shepheard* v. *Beetham* (1) there is no authority in favour of the heir-at-law, and there is no reason why the undisposed of realty should not bear the estate duty where the general personalty is insufficient in the same way as it bears other testamentary expenses and debts. The Finance Act, 1894, contains no provisions as to the incidence of that part of the estate duty which the executor has to pay. The provisions of s. 6, sub-s. 4, and s. 9, sub-s. 1, of that Act are for the benefit of the revenue and the relief of the executor, and are not for the benefit of the heir-at-law. There

(1) 6 Ch. D. 597.
(2) [1906] 1 Ch. 762, 766.
(3) [1894] 3 Ch. 615, 619.
(4) (1742) 2 Atk. 424, 438.
(5) (1883) 8 App. Cas. 812, 815.

is nothing in that Act to relieve the descended real estate from liability to make good a deficiency of the general personalty in respect of the general estate duty.

The intention of the testator is rather in favour of the specific legatee than the heir-at-law; the former is the direct object of the testator's bounty, the latter is not. The bounty of the testator is the real foundation of the whole doctrine of marshalling: *Aldrich* v. *Cooper*. (1) The fact that under the provisions of s. 9, sub-s. 1, of the Finance Act, 1894, real estate has to bear a rateable part of the estate duty in exoneration of the personalty does not relieve descended realty from the liability to make good in favour of specific legatees any deficiency of general personalty in respect of general estate duty which is primarily payable out of personalty any more than the fact that the realty descending to the heir-at-law is primarily liable for its own mortgages relieves it from liability to make good in favour of specific legatees a deficiency as regards other debts. In every case of marshalling against the heir-at-law in which the deficiency has been either caused or incurred by payment of estate duty there would have to be a sort of subsidiary marshalling in favour of the heir-at-law as regards so much of the deficiency as is due to estate duty having been paid, if *Shepheard* v. *Beetham* (2) is correct; and one would expect to find a provision to that effect in the forms of orders in Seton on Judgments, but that is not the case. The question is really uncovered by authority, and it is submitted that estate duty is on the same footing as the other testamentary expenses and debts and ought to be borne by the assets in the same order and therefore by undisposed of realty in priority to specifically bequeathed personalty.

H. B. Edge, for an annuitant, took no part in the argument on this point.

WARRINGTON J. The question in this case is whether the testator's estate must be so marshalled as to relieve the real estate not disposed of by the will from estate duty, which by s. 6, sub-s. 2, of the Finance Act, 1894, the executors are required to

(1) (1803) 8 Ves. 382, 396. (2) 6 Ch. D. 597.

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pay, namely, duty in respect of "personal property of which the deceased was competent to dispose at his death." The Finance Act, 1894, contains, so far as I can see, no material provision which assists me in the decision of the point I have to decide, except, possibly, sub-s. 4 of s. 8, which throws upon the heir the liability for estate duty in respect of real estate undisposed of.

The position of the estate is this: There was realty disposed of, specifically devised; there was realty not disposed of; there were some leaseholds and personalty which were specifically bequeathed, and there was a certain amount of undisposed of personalty. I think I am right in saying that the most valuable item of property consisted of the specifically bequeathed personalty. The undisposed of personalty, that is to say, the general personal estate, amounted to 2089*l.* 7*s.* 6*d.* The funeral and testamentary expenses and debts (including in the expression "testamentary expenses" the estate duty payable by the executors) amounted to 4873*l.* 7*s.* 1*d.*, being, therefore, 2783*l.* 19*s.* 7*d.* more than the general personal estate undisposed of. The estate duty on the specifically bequeathed personalty amounted to 2439*l.* 0*s.* 4*d.*, and has been paid with the funeral and other testamentary expenses and debts. The undisposed of realty was of the net value of 2608*l.*

It is said that if the ordinary course of marshalling the assets is in this case adopted, and if no distinction is made with reference to the estate duty, the result will be to throw upon the undisposed of realty a portion, if not the whole, of the estate duty payable in respect of the specifically bequeathed personalty. The order in which assets are administered for the purpose of paying debts is well known. The general personal estate comes first, and then, omitting some items which are not material to the present purpose, the undisposed of realty, as the fund out of which the debts are to be paid, and specifically bequeathed personalty or the devised realty is not resorted to until those previous funds are exhausted. That order of administration is the order which is adopted for the payment of debts. So far as I can see in the text-books, there is no express statement as to what is the order in reference to the payment of funeral and testamentary expenses, but funeral and testamentary expenses

are paid in order before debts, and therefore I can see no distinction, and I think that the order of administration for the payment of both funeral and testamentary expenses as well as of debts is that which I have mentioned. It is well settled that the estate duty payable by the executors is included in the expression "testamentary expenses," and it seems to me that that being so, in the absence of any authority to the contrary, it would be the duty of the Court to hold that no difference has been made in the order of administration by the passing of the Finance Act, 1894, which, except so far as is done by s. 8, sub-s. 4, with reference to duty not payable by the executors, does not, as is well known, provide for the incidence of duty, the general estate duty as distinguished from settlement estate duty. I think, therefore, that, independently of authority, the contention on the part of the heir-at-law would fail, and that the estate duty must be paid, like any other part of the testamentary expenses, and that the order of marshalling adopted in the case of debts is the proper order to adopt with regard to estate duty.

But the heir-at-law says that the point is not devoid of authority inasmuch as it was decided by Malins V.-C. in *Shepheard* v. *Beetham* (1) that probate duty ought not to be thrown upon the undisposed of realty. The case before the Vice-Chancellor was this. A testatrix made a charitable bequest. She appointed executors, but made no further dispositions of her property, real or personal, and the bequest to the charity was of pure personalty only. Therefore there was undisposed of personalty, specifically disposed of personalty, and undisposed of realty. The ordinary order of administration, therefore, in that case would be first the undisposed of personalty, then the undisposed of realty, and then the specifically disposed of personalty. A question arose whether the bequest to the charity was specific, and the Vice-Chancellor held that it was; and he accordingly held, with reference to the order of administration of assets, that the debts, funeral and testamentary expenses, and costs must be paid first out of the undisposed of personalty, next out of the undisposed of real estate, and lastly out of the subject of the specific bequest. So far there is nothing special in that,

(1) 6 Ch. D. 597.

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he was only following the ordinary well-known rule; but then he went on to decide that the specific bequest must exonerate the real estate from probate duty. So far as I can see *Shepheard* v. *Beetham* (1) is absolutely unique. I can find no other authority to the same effect, and the case seems never to have been referred to. It is not found to be referred to in any text-book; it is not referred to in Seton on Judgments, where one would expect to find any authority as to any departure from the ordinary rules of administration; it is not referred to in Jarman on Wills; it is not referred to in Ingpen on Executors; in fact, it cannot be found in any appropriate text-book except Theobald on Wills, 7th ed. p. 803. It is not there discussed, but the fact is mentioned that under that case probate duty could not be thrown upon the real estate. I think, perhaps, it is material to see how the question was brought before the Vice-Chancellor. First of all the main point in the case was argued, and he gave a decision upon it. Then there was some discussion as to the order of administration; and finally there is this note of the argument of Mr. Higgins, who appeared for the heir-at-law—"Higgins, Q.C., urged that at any rate probate duty should not fall upon the heir-at-law"; and, so far as the argument is concerned, that is the only hint there is of the point having arisen at all, and there is no answer to that on any one's part. The Vice-Chancellor deals first with the ordinary rule so far as the personal estate is concerned, and then says: "But when I come to the real estate, there is a clear difference as to the liability. The real estate goes to the heir by descent, and though he must be liable to the debts of the testatrix, it is not just that he should pay the probate duty, because, as he does not take under the will, he can have no interest in the will being proved." I might just suggest that, if that is correct, the same principle ought to have been applied to a great part of the testamentary expenses, the expenses of proving the will, for instance, which constitute a considerable part of the testamentary expenses. With that the heir-at law has nothing to do, but the decision of the Vice-Chancellor is confined to probate duty. It is not my business

(1) 6 Ch. D. 597, 602, 603.

to say anything more about that, except that my suggestion is an obvious criticism arising upon the decision, but, however that may be, assuming *Shepheard* v. *Beetham* (1) to be good law, so far as it goes, it seems to me I am not bound to follow it. It has reference to probate duty and not to estate duty. It has reference to a state of things which existed before the Land Transfer Act, 1897, a state of things which that Act has to some extent considerably modified. I am not forgetting s. 5, which provides that further duties shall not be thrown upon real estate. The position of the heir with reference to probate has been undoubtedly modified by the Land Transfer Act, 1897. I think the proper way of dealing with *Shepheard* v. *Beetham* (1) is to say that it dealt with probate duty only, a duty which is no longer payable, and with a set of circumstances which no longer exists, and on either ground I ought not to regard it as binding on me. My own opinion is that which I have already expressed, that the estate duty on personalty is part of the testamentary expenses, that testamentary expenses ought to be paid out of the assets in the same order in which other deductions payable by the executors ought to be borne, and therefore that the claim of the heir-at-law to have the assets marshalled in his favour so as to make a distinction between the estate duty and other testamentary expenses ought not to be entertained.

Solicitors for all parties: *Woodroffes & Ashby.*

(1) 6 Ch. D. 597.

W. I. C.

NEVILLE J. 1910 *Feb.* 8, 15.

In re BRITISH EQUITABLE BOND AND MORTGAGE CORPORATION, LIMITED.

[LIVERPOOL DISTRICT REGISTRY.]

[No. 2 of 1909.]

Company—Winding-up Petition—Bond Investment Holder—"Contingent or prospective creditor"—Locus standi of Petitioner—Assurance Company—Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *ss.* 2, 21—*Companies Act*, 1907 (7 *Edw.* 7, *c.* 50), *s.* 28—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 130 (iv.); *s.* 137, *sub-s.* 1 (*c*)—*Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 15, 34, 38.

The owner of an investment bond issued by an assurance company, who, upon making periodical payments to the company, will at a future date become entitled to the payment of a certain sum of money, is a "contingent or prospective creditor" of the company within the meaning of those words in s. 137 of the Companies (Consolidation) Act, 1908, and can under that section petition for the winding up of the company.

Semble, such a bondholder will by virtue of ss. 1 and 34 of the Assurance Companies Act, 1909 (which comes into operation on July 1, 1910), be deemed to be a policy-holder for the purposes of s. 15 of that Act, which is not an enabling but a restrictive section and limits the rights of policy-holders to present a winding-up petition as therein mentioned.

PETITION.

The above-named company was incorporated in April, 1899, under the Companies Acts, 1862 to 1890, with the nominal capital of 100,000*l.* divided into 10,000 shares of 1*l.* each and 9000 shares of 10*l.* each; and the objects for which the company was established were (amongst others) to issue bonds, certificates, mortgages, debentures, and securities of all kinds upon such terms and in such manner as might seem expedient, and to carry on the business of bankers and financial agents.

On December 18, 1909, M. Stannard (spinster) presented a petition against the company under s. 137 of the Companies (Consolidation) Act, 1908, for an order that the company might be wound up under that Act on the ground that the company was insolvent and unable to pay its debts. The petitioner was the registered holder of three investment bonds of class "A" and two investment bonds of class "B" issued to her by the company. By each of the said bonds the company promised, in

consideration of the payment to it of 5*s.* on entering into the bond and of the payment of 5*s.* a month for a period of 120 months, to pay to the registered holder of the bond at the expiration of that period the sum of 50*l.*, except that by one of the said "B" bonds the company promised, in consideration of the payment to it of 1*l.* a month for a period of 120 months, to pay to the registered holder of it at the expiration of that period the sum of 200*l.* Each of the bonds provided that if the registered holder failed to pay the whole of any of the monthly instalments when due he should pay a fine of 1*s.* to the company on each failure, which sum together with the instalment due should be paid on or before the last day of the same month in which such instalment became due, and that if the sum of 6*s.* was not paid within the said month the bond should become null and void and of no effect.

All the petitioner's said bonds were in full force and effect, and the earliest of the "A" bonds was issued on March 5, 1900, and would mature for payment on April 5, 1910. The earliest of the "B" bonds was issued on February 29, 1904.

Gore-Browne, K.C., and *Courthope Wilson*, for the petition.

A. Grant, K.C., and *Austen-Cartmell*, for the company, and *Younger, K.C.*, and *F. Buckley*, for a large number of bond investment holders in the same position as the petitioner, took the preliminary objection that the petition was demurrable. Under s. 82 of the Companies Act, 1862, only a creditor whose debt was presently payable could petition to wind up the company, and according to a note to that section in Buckley on Companies, 8th ed. p. 263, it includes the holder of a current life policy under the Life Assurance Companies Act, 1870. There is a similar note to s. 137 of the Companies (Consolidation) Act, 1908, in Buckley on Companies, 9th ed. p. 318. The petitioner is not a creditor whose debt is presently payable, because on the terms of each of the investment bonds there is no obligation on the part of the company to pay unless the instalments are kept up, and if default is made in the payment of any instalment the bond becomes null and void. Moreover s. 137 of the Act of 1908 does not apply. This is an assurance company, and the

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petitioner's right to a winding-up order is governed by s. 21 of the Life Assurance Companies Act, 1870 (1), which is unaffected by the Act of 1908 and remains in force until July 1 next, when the provisions of the Assurance Companies Act, 1909, come into operation. Sects. 1 and 34 of that Act would apply to the petitioner, and under s. 15 of the Act, which is an enabling section and defines the rights of policy-holders, the petitioner could not succeed. (2) Further, the petitioner is not a contingent or prospective creditor within the meaning of the Act of 1908 for the purpose of presenting a winding-up petition. A prospective creditor is one who has a maturing claim which will inevitably by mere lapse of time ripen into a debt, but whose debt is not presently payable, the right to receive payment enuring at a future date. A contingent creditor is one whose jus actionis against the company is contingent on some act done or omitted by a third party: Buckley on Companies, 9th ed. pp. 460–1.

(1) The Life Assurance Companies Act, 1870, s. 21, enacts:

"The Court may order the winding up of any company, in accordance with the Companies Act, 1862, on the application of one or more policy holders or shareholders, upon its being proved to the satisfaction of the Court that the company is insolvent, and in determining whether or not the company is insolvent the Court shall take into account its contingent or prospective liability under policies and annuity and other existing contracts; but the Court shall not give a hearing to the petition until security for costs for such amount as the judge shall think reasonable shall be given, and until a prima facie case shall also be established to the satisfaction of the judge . . . ."

(2) The Assurance Companies Act, 1909 (s. 1), applies the Act to all companies who carry on (amongst other things) a bond investment business.

Sect. 34 (*a*): "The expression 'policy' includes any bond, certificate, receipt, or other instrument evidencing the contract with the company, and the expression 'policy holder' means the person who for the time being is the legal holder of such instrument."

Sect. 15: "The Court may order the winding up of an assurance company, in accordance with the Companies (Consolidation) Act, 1908, and the provisions of that Act shall apply accordingly, subject, however, to the following modification:—

"The company may be ordered to be wound up on the petition of ten or more policy holders owning policies of an aggregate value of not less than ten thousand pounds:

"Provided that such a petition shall not be presented except by the leave of the Court, and leave shall not be granted until a prima facie case has been established to the satisfaction of the Court and until security for costs for such amount as the Court may think reasonable has been given."

The petitioner's claim is in the nature of a claim that may never ripen into a debt if default is made by her in payment of any instalment. Her claim sounds only in damages, and she is not a contingent or prospective creditor within s. 21 of the Act of 1870 nor within s. 137 of the Act of 1908.

Maugham and *F. Buckley*, for other bond investment holders, supported the objection.

Gore-Browne, K.C. It is admitted that prior to the Companies Act, 1907, a prospective or contingent creditor could not petition. But s. 28 of the Act of 1907 (1) provides that any contingent or prospective creditor of a company may present a petition, and the language of the section is obviously taken from s. 21 of the Act of 1870. The Act of 1907 is repealed by the Act of 1908, and s. 28 is not re-enacted as a whole in the Act of 1908, but it is reproduced partly in s. 130 (iv.) and partly in s. 137, sub-s. 1 (*c*). The Act of 1870 only applies to life assurance companies and remains in force until July next, but the Assurance Companies Act, 1909, if it were in operation would apply to this company. Sect. 15 of that Act is a restrictive section, because the Act of 1870 and the Act of 1907 enable a single policy-holder to petition, but under s. 15 the right to petition is limited to ten or more policy-holders owning policies to the aggregate amount of 10,000*l*. It is submitted that the petitioner is a contingent or prospective creditor of the company within the meaning of s. 137 of the Act of 1908 and is entitled to present this petition.

Tomlin, for a large number of bond investment holders, supported the petition. Under the Act of 1908 a creditor of the company does not mean only a person to whom money is due in præsenti from the company, but any person who has a

(1) The Companies Act, 1907, s. 28, enacts :—

"In determining whether a company is unable to pay its debts within the meaning of section 80 of the Companies Act, 1862, the Court shall take into account the contingent and prospective liabilities of the company, and any contingent or prospective creditor shall be a creditor entitled to present a petition for winding up the company under section 82 of that Act: Provided that the Court shall not give a hearing to a petition for winding up the company by such a creditor, until such security for costs has been given as the Court thinks reasonable, and until a prima facie case for winding up has been established to the satisfaction of the Court."

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pecuniary claim against the company, whether actual or contingent, for which the company is liable: Buckley on Companies, 9th ed. pp. 270, 734.

A. L. Briscoe, for two bond investment holders whose bonds had matured for payment, supported the petition.

Rutherford, for other bondholders, supported the petition.

A. Grant, K.C., in reply, referred to s. 206 of the Act of 1908.

NEVILLE J. I think I ought to decide, in the first instance, the preliminary point that has been raised. It is true that in the present case it is not of very great importance, because the petition in question is supported by two creditors whose bonds have matured and who under any circumstances would have the right to present the petition, and, if the existing petitioner had not got a locus standi, it is within the power of the Court, on the application of the creditors who have the right, to give the conduct of the petition to them. The question is, whether the holder of a bond who, upon the making of periodical payments, will at a future date become entitled to the payment of a sum of money by the company is a contingent or prospective creditor within the meaning of s. 137 of the Companies (Consolidation) Act, 1908, which includes "any contingent or prospective creditor or creditors." No doubt originally the Companies Acts did not allow of the presentation of a petition for winding up by a contingent or prospective creditor, and that continued to be the law until the passing of the Act of 1907, but the Life Assurance Companies Act of 1870, s. 21, provided that the Court might order the winding up of any assurance company in accordance with the Companies Act, 1862, on the application of one or more of the policy-holders or shareholders subject to certain conditions, and the section goes on to say, "In determining whether or not the company is insolvent the Court shall take into account its contingent or prospective liability," and so on. Then in the Companies Act, 1907, s. 28 is introduced, which I think is not without reference to s. 21 of the Life Assurance Companies Act, 1870. That s. 28 provides, "In determining whether a company is unable to pay its debts within the meaning of section 80 of the Companies Act, 1862, the Court shall take into

account the contingent and prospective liabilities of the company, and any contingent or prospective creditor shall be a creditor entitled to present a petition for winding up the company under section 82 of that Act," and so on. Now those provisions of s. 28 are to be found in the Act of 1908, but instead of being both contained in one section they are to be found in different sections of that Act, and I have no doubt that the words "contingent or prospective creditor" in the Act of 1908 bear no other interpretation than that which would be applied to contingent or prospective creditor in the Act of 1907; consequently I have to consider what was the extent of the meaning of the words when they were introduced into the Act of 1907. It is not denied that such a liability as the present is a contingent or prospective liability of the company which would have to be taken into consideration under s. 21 of the Act of 1870, but it is said the contingent and prospective liabilities of the company which have to be taken into account in considering insolvency under s. 21 are different in extent from the claims of a creditor described as "any contingent or prospective creditor" in s. 28 of the Act of 1907. I cannot think that is so. I think the contingent or prospective creditor mentioned in s. 28 must be a creditor contingent or prospective in respect of the liabilities of the company mentioned in the previous lines; and that, secondly, "contingent or prospective creditor" includes such a person as a policy-holder and such a person as the petitioner in the present case, whose position does not seem to me distinguishable from that of the holder of a policy. It is said that construction is inconsistent with a statutory provision which is made by the Act of 1909, which will not come into force until July of this year, which provides (s. 15) that the Court may order the winding up of an assurance company in accordance with the Companies (Consolidation) Act, 1908, "on the petition of ten or more policy holders owning policies of an aggregate value of not less than ten thousand pounds: Provided that such a petition shall not be presented except by the leave of the Court, and leave shall not be granted until a prima facie case has been established to the satisfaction of the Court and until security for costs for such amount as the Court may think reasonable has been given."

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It is said that that is an enabling section and not a limitation of the general right under the Act of 1870. It seems to me that is not so, and that s. 15 is in fact a section which limits the right of policy-holders to the particular case provided for by that section. Apart from the question of the Act of 1908, they had undoubtedly under the Act of 1870 a right to present a petition for winding up, and I think that the operation of this s. 15 in any event must be to limit the general right given under the Act of 1870, that is to say, with regard to companies which come within the definition clause (s. 1) of the Act of 1909 as applied to cases of this kind under s. 15. I think, therefore, that the contingent or prospective creditors mentioned in s. 137 of the Act of 1908 includes the present petitioner. There is a note to that section in Buckley on Companies, 9th ed. p. 318, which, referring to the words "contingent or prospective creditor," says "including under the Life Assurance Companies Act, 1870, the holder of a current policy," and then there is a reference to the Life Assurance Companies Act, 1872. If s. 137 does include the holder of a current life policy, then the right to wind up is not derived under the Life Assurance Companies Act, 1870. If it is only derived under the Life Assurance Companies Act, 1870, then it is not included in this section; and, therefore, it seems to me that the brevity of that note somewhat interferes with its lucidity, and that I cannot get much assistance from it. Independently of that note, I come to the conclusion that the present petitioner is included in "any contingent or prospective creditor" mentioned in the Act of 1908. The petition must proceed.

It was then agreed that the petition should stand over with a view to terms being arranged between the parties.

Solicitors for the petitioner and parties supporting the petition: *Brighouse, Ryland & Co., Liverpool; Pritchard, Englefield & Co., for J. H. Glover, Liverpool; Josiah Dean & Son, Liverpool; P. W. Martin, Liverpool.*

Solicitors for the company and parties opposing the petition: *Busk, Mellor & Norris, for R. E. Fieldhouse, Manchester; Marston & Robinson, for W. A. Taylor, Manchester.*

H. L. F.

PARKER J.
1909
Dec. 17.
1910
Jan. 17.

In re PARKER.
PARKER *v.* PARKIN.

[1909 P. 1232.]

Heirlooms—Direction in Will for Chattels to pass with Real Estate—Death of Infant Tenant in Tail without having Possession.

E. was legal tenant for life in possession of a mansion-house under a will, which limited the mansion-house in remainder to his first and other sons in tail, and bequeathed certain pictures as heirlooms, to pass with the house in the same manner as if they were land or other real property appendant or appurtenant thereto, and to continue annexed to the house as long as the law would permit, and be inherited or enjoyed by the several persons who should succeed to the house under or by virtue of the limitations contained in the will. The eldest son of E. died in his lifetime, an infant and unmarried, but E. had two other sons, one of whom had attained twenty-one:—

Held, that E., as next of kin of the deceased son, was entitled absolutely to the chattels settled as heirlooms.

In re Lord Chesham's Settlement, [1909] 2 Ch. 329, distinguished.

The mansion-house and estate of Skirwith Abbey, in the county of Cumberland, stood limited, under the will of William Parker (dated September 11, 1828) and his fifth codicil (dated November 2, 1853) and in the events which had happened, to the use of Edward Wilson Parker for life, with remainder to the use of his first and other sons in tail, with certain remainders over.

By his first codicil (dated April 16, 1838) William Parker had willed and directed that "all and every the family and other pictures, and the plate, linen, china ware, books and furniture, of or usually in or about my said mansion house at Skirwith Abbey, shall be considered as or in the nature of heirlooms, and shall pass with my said house in the same manner as if they were land or other real property appendant or appurtenant thereto, and shall accordingly continue annexed to my said mansion house so long as the law will permit, and be inherited or enjoyed by the several persons who shall succeed to my said mansion house under or by virtue of the limitations in my said will and hereinbefore contained respecting the same, and be

PARKER J. 1910 PARKER, *In re.* PARKER *v.* PARKIN.

subject to the rules of law or equity applicable thereto, and in no wise pass under or by any bequest of my personal or residuary estate or effects, but subject nevertheless to reasonable wear and deterioration by use." And the testator directed proper inventories to be made of the pictures and other chattels, and that an attested copy thereof should be deposited with the writings and title deeds of the estate "for the better information of the persons becoming successively entitled thereto."

The testator in other codicils referred to the pictures, furniture, and other articles of or usually in or about the mansion-house "which I have bequeathed as heirlooms," and confirmed the bequest. He died on January 22, 1856. Edward Wilson Parker became tenant for life in possession in 1876 and had three sons. The eldest of these, Edward Carleton Parker, was the first tenant in tail under the will and codicils. He was born on July 13, 1884, and died, without having been married, in 1900. Administration was never taken out to his estate. The other two sons were living, and one had attained the age of twenty-one years. By an order of Warrington J., dated July 2, 1909, and made on a summons taken out under the Settled Land Acts, liberty was given to Edward Wilson Parker to sell four of the pictures. They were offered for sale by auction at Christie's, when three of them were sold and realized upwards of 15,000*l.* E. W. Parker now took out an originating summons under Rules of the Supreme Court, 1883, Order LIVa., for a declaration that upon the true construction of the will and codicils he was absolutely entitled to the net proceeds of sale and to the rest of the heirlooms.

Romer, K.C., and *W. M. Spence*, for the applicant. On taking out administration to Edward Carleton Parker, the deceased tenant in tail, the applicant, as his next of kin, will be absolutely entitled to the heirlooms. It will probably be contended, on the authority of *In re Lord Chesham's Settlement* (1), that, as the tenant in tail never came into possession, he never obtained an absolute interest in the heirlooms. But in that

(1) [1909] 2 Ch. 329.

case there were clear words pointing to actual possession by the tenant in tail. Where, as in the present case, the chattels are only annexed to the house, they will, if settled in the same way as the real estate, vest absolutely in the first tenant in tail when he is born: *Foley* v. *Burnell* (1); *Lord Scarsdale* v. *Curzon* (2); although the settlor may prevent the rule being applicable by a reference to "actual" possession, in which case, if the tenant in tail in remainder dies in the lifetime of the tenant for life, the former will not take the heirlooms: *In re Angerstein* (3); *In re Fothergill's Estate.* (4) Under very similar words to those in the present case the first tenant in tail was held absolutely entitled in *In re Cresswell.* (5) [They also referred to Davidson's Conveyancing, 2nd ed. vol. iii. pp. 514–516; Key and Elphinstone's Precedents in Conveyancing, 9th ed. vol. ii. pp. 717, 719; *In re Dayrell.* (6)]

[PARKER J. referred to *Countess of Harrington* v. *Earl of Harrington.* (7)]

Martelli, K.C., and *E. F. Lever*, for the persons entitled to the mansion-house in remainder. In *Foley* v. *Burnell* (1) there were no such words as "annexed to the mansion house." The application of the general rule stated by counsel for the applicant can be excluded by the settlor. It could not have been intended that an infant tenant in tail who never came into possession should take an absolute interest in the heirlooms. No one is entitled to claim the use and enjoyment of them except in conjunction with the manor-house, and only if and when he is entitled to the possession of that house, so that he is to enjoy them in situ where alone they are intended to be enjoyed: per Farwell L.J. in *In re Lord Chesham's Settlement.* (8) [They also referred to *In re Lord Chesham* (9); *Hogg* v. *Jones.* (10)]

F. E. Ward, for the trustees of the will.

(1) (1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319.
(2) (1860) 1 J. & H. 40.
(3) [1895] 2 Ch. 883.
(4) [1903] 1 Ch. 149.
(5) (1883) 24 Ch. D. 102.
(6) [1904] 2 Ch. 496.
(7) (1871) L. R. 5 H. L. 87.
(8) [1909] 2 Ch. 329, 337.
(9) (1886) 31 Ch. D. 466, 471.
(10) (1863) 32 Beav. 45.

PARKER J. 1910 PARKER, *In re.* PARKER *v.* PARKIN.

Romer, K.C., in reply. The phrase "estate tail in possession" does not necessarily mean actual possession, but may be construed as meaning entitled to a vested estate tail in the property, although it may be vested in remainder only: *Martelli* v. *Holloway*. (1)

Cur. adv. vult.

Jan. 17. PARKER J. The question I have to decide is whether, according to the true construction of the will and codicils of the late William Parker, certain chattels which the testator directed to be considered as heirlooms, and to pass with his mansion-house at Skirwith Abbey, vested absolutely in Edward Carleton Parker, who, on his birth on July 13, 1884, took in the mansion-house, under such will and codicils, a vested estate in tail in remainder expectant on the decease of his father, the present applicant, or whether Edward Carleton Parker, by reason of his death while his estate was still in remainder, took no interest in these chattels.

It is, in my opinion, clear, both on principle and on authority, that, where chattels are simply directed to pass as heirlooms with real estate, the first person who under the limitations of the settlement becomes entitled to the real estate for a vested estate of inheritance, whether in possession or remainder, becomes absolutely entitled to the chattels, subject, of course, to his interest being defeated by any event which would defeat his estate in the realty, and, if such estate is in remainder, subject to all prior limited interests such as interests for life.

This rule is thought to give effect, and does, in my opinion, give effect, to the testator's expressed intention as nearly as the nature of the property admits, it being impossible wholly to effectuate such intention, because the law does not allow the creation of estates or heritable interests in personal property, and has rules against perpetuities. A settlor may, of course, use words shewing an intention to modify the rule, but the words relied on for this purpose must indicate such intention with reasonable certainty. Thus it is possible to introduce a provision defeating the interest of a tenant in tail by purchase who

(1) (1872) L. R. 5 H. L. 532.

dies under the age of twenty-one years, but such a provision will not be implied merely by a direction that the real estate and chattels shall go together as long as the rules of law and equity permit. There must be an express provision to that effect. Similarly it is possible to introduce provisions defeating the interest of a tenant in tail who does not come into actual possession of the property; but words which are to have this effect must be reasonably clear and certain. Further, in considering whether the testator has manifested an intention contrary to the ordinary rule, the Court ought not to be influenced by the actual events which have occurred. If the real estate be settled on a father for life, with remainder to his first son in tail, and a son is born and dies in early infancy, probably a settlor would say that it would not effectuate his intention to give the son an absolute interest in the heirlooms which the father would take as his administrator; but this would be no reason why the Court should lay hold of doubtful expressions and infer therefrom an intention to defeat the son's interest unless he came into actual possession, for had the son attained twenty-one and joined with his father in resettling the realty, it is equally probable that the settlor would have said that his intention could only be effectuated by a resettlement of the heirlooms, which would be impossible unless the son had a vested interest, although he had not become entitled to actual possession of the realty. Indeed, it is precisely for this reason that, in the opinion of conveyancers, provisions defeating the interest of a tenant in tail unless he comes into possession are undesirable.

By way of illustration of what I have said above, I may refer to *Foley* v. *Burnell* (1), where the chattels were directed to be held and enjoyed by the several persons who from time to time should successively be entitled to the use and possession of the settled realty, as in the nature of heirlooms, to be annexed and go along with the settled realty. The reference to possession was, as appears from *Martelli* v. *Holloway* (2), construed as referring to vested as opposed to contingent interests, and not to actual possession, and a tenant in tail who died without coming into actual possession was held to be absolutely entitled to the

(1) 1 Bro. C. C. 274. (2) L. R. 5 H. L. 532.

PARKER J. 1910 PARKER, *In re.* PARKER *v.* PARKIN.

chattels. It might have been otherwise if the words had been "actual possession:" see *Lord Scarsdale* v. *Curzon* (1), *Hogg* v. *Jones* (2), *In re Fothergill's Estate* (3), and *In re Angerstein.* (4)

In the present case the chattels are directed to be considered as in the nature of heirlooms and to pass with the settled mansion-house in the same manner as if they were land or other real property appendant or appurtenant thereto, and they are accordingly to continue annexed to the mansion-house so long as the law will permit, and be inherited or enjoyed by the several persons who shall succeed to the mansion-house. I cannot find any other words which are material to the question at issue. If, therefore, the ordinary rule is not to apply, it must be because a contrary intention is to be gathered from the words "shall continue, as long as the law will permit, annexed to the mansion house, and be inherited or enjoyed by the several persons who shall succeed to my mansion house." Having regard to what is said by Lord Loughborough in *Foley* v. *Burnell* (5), I cannot attach any importance to these words. It is true that the word "annexed" was not used in the passage of the will he was construing, but he says, "It is clear he"—the testator—"meant to annex the chattels to the real estate as heirlooms." Further, the actual words used in the present case were held by Kay J., in *In re Cresswell* (6), not to negate the application of the ordinary rule as above stated. So far as I can see, therefore, there is nothing in the present will or codicils to negate the ordinary rule.

I was, however, much pressed with the decision of the Court of Appeal in the recent case of *In re Lord Chesham's Settlement.* (7) In that case the settlor had directed his trustees to permit the chattels in question to be used, held, and enjoyed with the mansion-house by the persons who for the time being should be entitled to the mansion-house. On the construction of these words it was held that no one could be entitled to use or enjoy the chattels who was not also

(1) 1 J. & H. 40.
(2) 32 Beav. 45.
(3) [1903] 1 Ch. 149.
(4) [1895] 2 Ch. 883.
(5) 1 Bro. C. C 274, 283.
(6) 24 Ch. D. 102.
(7) [1909] 2 Ch. 329.

entitled to the use and enjoyment of the mansion-house, and, therefore, that the chattels did not vest in a tenant in tail in remainder. The form of the gift was quite different from the form of the gift in the case I am considering, for in this case there is no reference to the use and enjoyment of the chattels with the mansion-house. They are merely directed to pass with the mansion-house, words which refer to the interests created rather than to the conditions of user. And, further, there is nothing in *In re Lord Chesham's Settlement* (1) to throw the least doubt upon the principles to be deduced from the earlier cases, or on the soundness of the decisions arrived at in such cases.

I hold, therefore, that, on the true construction of the will and codicils in question, the applicant is right in his contention.

Solicitors for all parties: *James & James, for Clutterbuck, Trevenen & Steele, Carlisle.*

[1909] 2 Ch. 329.

F. E.

EVE J.
1909
Nov. 10, 17.

WORTHINGTON & CO., LIMITED *v.* ABBOTT.

[1908 W. 2598.]

Mortgage—Foreclosure absolute—Puisne Incumbrancer—Consent Order—Effect—Right to sue on Covenant in Mortgage—Condition Precedent—Demand in Writing—Following Assets in Hands of Residuary Legatees and Devisees of Mortgagor — Judgment against Heir-at-Law — Form of Order — Debts Recovery Act, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 47), *s.* 3.

Where various parties to an action agree an order purporting to be a consent order, the agreement must be treated as embodying terms to which all assent, and by which all are bound.

A puisne incumbrancer who voluntarily submits to a foreclosure order absolute being made upon an originating summons, without insisting upon his right to have a time allowed within which to redeem a prior incumbrancer, does not thereby preclude himself from suing on the covenant for payment in the mortgage deed, and recovering his debt from the residuary legatees and devisees of the deceased mortgagor.

A mortgage of a leasehold public-house by a testatrix contained a covenant that she, or those deriving title under her, would, upon demand in writing left at the public-house, repay the principal sum advanced with interest. No demand in writing was ever made on the premises:—

Held, that effect was given to the true intention of the parties to the deed if it was brought home to the mortgagor, or those claiming under her, that the mortgagees were demanding their money, and were about to take proceedings to recover it.

By an indenture of mortgage dated December 22, 1897, Emily Caroline Culver, a widow, in consideration of 5000*l.* advanced to her by Worthington & Co., Limited (the plaintiffs), and for securing the repayment of that sum and interest thereon, and further advances, mortgaged to Worthington & Co., Limited, a leasehold public-house called "The Two Brewers" in High Street, Clapham, subject to two prior mortgages, both dated December 22, 1897, and both of which were now held by the City of London Brewery Company, Limited, and subject to the usual proviso for redemption; and the deed contained a covenant that the mortgagor, or the persons deriving title under her, would, "upon demand in writing by the company, or upon demand in writing signed by any person or persons on behalf of the company, or by the assigns of the company, and left at the

said messuage or public-house called 'The Two Brewers,' pay to the company, or their assigns, the sum of 5000*l.* with interest for the same at the rate of 5*l.* per cent. per annum from the date hereof, with payment of the same sum and also all such further sums as shall for the time being be due to the company, or their assigns, from the mortgagor."

On June 22, 1900, the plaintiffs made a further advance to E. C. Culver of 62*l.* 10*s.*

On February 6, 1904, an originating summons was taken out by the City of London Brewery Company, Limited, as first mortgagees, against E. C. Culver, Worthington & Co., Limited, and Booth's Distillery, Limited (who were subsequent incumbrancers), asking for the usual accounts, and to enforce their security by foreclosure or sale.

On June 17, 1904, an order was made upon this summons, whereby it was "by consent ordered that the defendant, Emily Caroline Culver (widow), Worthington & Co., Limited, and Booth's Distillery, Limited, do from henceforth stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mortgaged premises," but such consent was made without prejudice to the rights of Booth's Distillery, Limited, in respect of their other securities on property belonging to the mortgagor.

This order was arrived at pursuant to a prior agreement between the City of London Brewery Company, Limited, Worthington & Co., Limited, and Booth's Distillery, Limited, that the City of London Brewery Company, Limited, should take an immediate order for foreclosure absolute without any accounts being taken, or any time being given to Worthington & Co., Limited, to redeem the City of London Brewery Company, but Booth's Distillery, Limited, made the stipulation as to their other securities which was embodied in the consent order. The mortgagor had also agreed to waive accounts, and consent to the order.

At the date of this foreclosure order absolute Worthington & Co. believed that E. C. Culver was without means and unable to make any payment under the covenant in the mortgage. She continued in possession of the mortgaged premises until

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May, 1906, and died on February 13, 1907, leaving estate of the value of over 8000*l*. By her will, dated December 18, 1906, E. C. Culver appointed the defendants Julia Florence Ballantine and Graham Keith executors and trustees thereof, and after making various specific and pecuniary bequests, and also devising certain freehold houses, messuages, or tenements to the defendants Julia Florence Ballantine, Arthur William Abbott, Graham Keith, and Florence Isabel Clark respectively, she devised and bequeathed all her residuary real and personal estate to the executors and trustees upon trust for sale and conversion, and, after payment of funeral and testamentary expenses and debts, to stand possessed of the residue of such money on trust for the defendants Frederick George Henry Abbott, Arthur William Abbott, Henry Octavius Abbott, Charles Alfred Abbott, and Julia Florence Ballantine in equal shares. Frederick George Henry Abbott was the heir-at-law of the testatrix and it was alleged in the pleadings that he took nothing by descent from her. The executors issued notices by advertisement for creditors and others to send in their claims against the estate, and subsequently, in reliance upon the statute 22 & 23 Vict. c. 35, s. 29, and in ignorance of the liability of E. C. Culver to the plaintiffs under the mortgage, they distributed the estate amongst the persons entitled under the will. The five residuary legatees received 749*l*. 2*s*. 11*d*. each. There was evidence that there was due to the plaintiffs for principal and interest under the covenant contained in the mortgage deed a sum of 7027*l*. 1*s*. 11*d*.

The plaintiffs claimed a declaration that the five residuary legatees were liable to refund all moneys received by them respectively in respect of their shares in the proceeds of sale of the residuary estate of E. C. Culver, so far as might be necessary to make good to the plaintiffs the amount due to them for principal and interest under the covenant in the mortgage of December 22, 1897, and that the amount so due constituted a charge upon such (if any) of the real and personal estate of E. C. Culver devised by her will as was not sold or converted by the trustees, and that such charge might be enforced by sale.

The main defence raised by the pleadings was that the plaintiffs, by consenting to the immediate order for foreclosure absolute, had parted with their interest in the public-house comprised in the mortgage, and had rendered it impossible for them to reconvey the same to the mortgagor on payment of what was due under the mortgage. They also alleged laches and acquiescence, and pleaded the Statutes of Limitations.

At the bar the further defence was raised that the condition precedent of a demand in writing made upon the mortgaged premises had not been complied with.

The evidence with regard to the demand for payment was that when the plaintiffs heard of the death of the mortgagor they communicated by letter with her legal personal representative, intimating that they were intending to demand payment of the amount secured by the covenant, and in a subsequent letter they indicated what the amount of their demand was. On ascertaining that the property had been distributed they wrote to the legatees, stating the nature of the action which they contemplated, but some of these letters were returned through the dead letter office.

Stewart-Smith, K.C., and *W. Gordon Brown*, for the plaintiffs. With regard to the real estate passing by the will, the action is founded on the Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47). This debt is a specialty debt, and the heirs are also bound: *In re Lacey* (1); Carson's Real Property Statutes, pp. 388—389. There is no authority for saying that the mere fact that a mortgagee has assented to a foreclosure order absolute, which was inevitable, deprives him of his right to sue on the covenant in the mortgage. In the present case the equity of redemption was worth nothing, and the mortgagee would have gained nothing by refusing to consent to the order of June 17, 1904.

As to the personal estate passing by the will, the plaintiffs do not ask for their claim to be satisfied out of the specific or pecuniary legacies bequeathed by the testatrix, but they are entitled to follow the assets of the testatrix into the hands of the

(1) [1907] 1 Ch. 330, 347.

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residuary legatees and the devisees. The action is against the residuary legatees personally, and nothing is claimed against the executors of the will as such, but they are properly made defendants: *Hunter* v. *Young*. (1) It may be that if unauthorized acts were done by a mortgagee, to the detriment of the mortgagor, the mortgagee might be precluded from suing on the covenant; but that is as far as any of the cases go. Here the mortgagor assented to the foreclosure order absolute, which was "by consent," and therefore is in the nature of an agreement between all the parties to it, to which all the parties subscribed and in which all concurred. It cannot consist of separate and independent agreements between the various parties to it, but binds all: *Palmer* v. *Hendrie* (2); *Lockhart* v. *Hardy* (3); *Rudge* v. *Richens* (4); *Walker* v. *Jones*. (5) The mortgagees did no unauthorized act, but properly consented to the foreclosure order being made. They are therefore entitled to enforce their remedy under the covenant. Secondly, as to the allegation that there was no demand in writing within the meaning of the covenant, it is clear, on the letters, that the matter was brought to the knowledge of those against whom the claim was made. It would have been useless to have left a notice at the public-house. The condition precedent has been sufficiently complied with according to the intention of the covenant.

P. O. Lawrence, K.C., and *Percy F. Wheeler*, for the defendant residuary legatees and devisees. The mortgagees by their voluntary act have parted with their power to reconvey the mortgaged premises to the mortgagor, and therefore they cannot sue on the covenant. Their rights have gone, as they have parted with all their interest. The mortgagor was not an assenting party to anything that the plaintiffs agreed to under the order. The consent order was in the nature of separate agreements between the plaintiffs and the various defendants in that action: *Kinnaird* v. *Trollope*. (6)

On the second point, as to the demand in writing, under the express words of the covenant the demand should have been made upon the public-house premises. There is no statement of

(1) (1879) 4 Ex. D. 256.
(2) (1859) 27 Beav. 349.
(3) (1846) 9 Beav. 349.
(4) (1873) L. R. 8 C. P. 358.
(5) (1866) L. R. 1 P. C. 50, 61.
(6) (1888) 39 Ch. D. 636.

a demand having been made in the pleadings. That is a condition precedent to enable the plaintiffs to sue.

[EVE J. referred to the letters which had passed.]

These alleged notices in writing are not sufficient within the covenant according to the authorities. The words are construed strictly: *Brighty* v. *Norton* (1); *Toms* v. *Wilson* (2); *Belding* v. *Read* (3); *Ex parte Trevor* (4); *Ex parte Lamb* (5); *Moore* v. *Petchell* (6); *Thorn* v. *City Rice Mills.* (7) Upon the question of the construction of the covenant the defendants are therefore entitled to succeed.

H. E. Wright, for the executors and trustees of the will.

Stewart-Smith, K.C., in reply. The form of the order asked is similar to that in *Davy* v. *Pepys* (8), and a judgment against the heir-at-law of the testatrix is properly inserted, having regard to s. 3 of the Debts Recovery Act, 1830: *Wood* v. *Harper*, referred to in a note to *Jeffreson* v. *Morton* (9), where the form is set out in part.

EVE J., after stating the facts, continued:—In order not to complicate matters at this stage, I will treat this as though it were an action brought against Mrs. Culver on her covenant, the mortgagees having discovered that the mortgagor is not as impecunious as they have consistently since 1904 believed her to be. To the claim of the mortgagees to enforce the covenant two defences are raised. In the first place it is said that, upon the true construction of the order made on June 17, 1904, and in the events upon which that order is founded, the right to sue the mortgagor on the covenant is gone; and, secondly, it is said that, even if the liability on the covenant be subsisting, the right to sue is subject to a condition precedent which has not been complied with. In answer to these contentions it is argued that the order does not operate to debar the mortgagees from enforcing their rights under the covenant, and further, assuming that point to be determined in favour of the mortgagees, that they have in fact complied with all the conditions precedent having regard to the true intent

(1) (1862) 3 B. & S. 305.
(2) (1862) 4 B. & S. 442.
(3) (1865) 3 H. & C. 955.
(4) (1875) 1 Ch. D. 297.
(5) (1881) 19 Ch. D. 169.
(6) (1856) 22 Beav. 172.
(7) (1889) 40 Ch. D. 357.
(8) (1572) 2 Plowd. 438a, 440.
(9) 2 Wms. Saund. (1871 ed.), pp. 12, 36.

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and meaning of the covenant upon which they are suing. They contend that the order being a consent order is in the nature of an agreement between the first mortgagees, themselves as the second mortgagees, the third mortgagees, and the mortgagor, and that upon the true construction of the order the mortgagor was privy to and concurred in all that the order effects; that an order which is prefaced by the words "by consent" cannot be treated as being, or as embodying, separate and independent agreements between the plaintiff and the several defendants; and that, properly construed, such an order is, in effect, an agreement embodying terms to and in which all the parties to the action subscribe and concur. I am inclined to think that is the true construction to be placed on a consent order, and that, when the parties to an action agree an order purporting to be a consent order throughout, they are, in effect, putting their hands to an agreement which must be treated as embodying terms to which all assent and by which all are bound.

It may be, of course, that some of those terms affect individual defendants more than they do other defendants, or that some of the terms, as we find in this order, affect some of the defendants only; but I think even in those cases all parties to the order must be treated as having assented to and concurred in any special terms affecting particular parties contained in the consent order.

It is urged, however, that in this case the consent order of June 17, 1904, ought not so to be construed, and evidence has been produced and correspondence read going to rebut such construction. I doubt very much whether, for the purpose of construing the order, I am entitled to consider the evidence or correspondence, but they are not very material, as they refer to matters which took place a considerable time before the order was made, and if any circumstances are to be relied on as affecting the construction they should, I think, be circumstances subsisting at the time when the order was made, and not circumstances which may have materially changed in the interval between their happening and the date of the order. I have no evidence of the circumstances subsisting at the date of the order, and as a matter of construction I should be prepared to hold it to be an order which binds the mortgagor, an order in which she concurred, and an order

therefore by which the mortgagees could not, by agreeing to an immediate foreclosure absolute, be held to be doing something contrary to the wishes of, or unauthorized by, the mortgagor.

But I am not going to determine this part of the case on that point alone. It is quite possible that another Court may take a different view of the construction of this order. Moreover, the determination of that point would, after all, leave undecided the important question which has been argued strenuously before me, and which I think it is my duty to deal with, as it arises on the case. The question arises in this way. The defendants contend that a puisne incumbrancer who voluntarily submits to an order absolute being made when the summons is issued, and without insisting upon his right to have a time allowed to him wherein he may redeem the prior incumbrancer, thereby precludes himself from afterwards suing on the covenant; and in support of that contention they cite and rely upon a number of cases which certainly have determined this, that if the mortgagee by voluntarily doing something which he is unauthorized to do, either by the express terms of the contract between him and the mortgagor, or by implication arising from that express contract, puts it out of his power to reconvey the mortgaged premises to the mortgagor on payment, he cannot afterwards sue on the covenant. The question is, does the conduct of the mortgagees in this case fall within the principle established by those cases? The puisne incumbrancers when served with this summons might have adopted any one of three courses. They might have entered no appearance; that would have been a voluntary act, an act of omission, not of commission. They might have appeared and insisted upon their strict rights. The effect of that would have been that the first mortgagees, the plaintiffs, would have had to bring in their accounts, the accounts would have been vouched in chambers, a certificate would have been made, and a period of six months would have had to elapse before the plaintiffs would have obtained the full relief which they were seeking. Or, thirdly, they might have adopted the course which was in fact adopted in this case. Have they by so doing put themselves in a worse position than they would have been in had they adopted either of the other two alternatives? Are puisne

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incumbrancers, although satisfied of the insufficiency of their security and of the accuracy of the accounts of the prior incumbrancers and although they never intend to redeem the prior incumbrancers, bound to insist upon the accounts being taken and the formality of a period wherein they may redeem being fixed in order to preserve their right under the covenant?

I have not heard it suggested that if the present plaintiffs had adopted either of the first two alternatives they would have prejudiced themselves with regard to the covenant. If they had not appeared, the proceedings would have had to go on, but they would then have been of a very simple character: the mortgage would have been proved, the account taken, and according to well-settled practice a period of six months would have been fixed for redemption. That is to say, if they had adopted the first alternative, at the end of the six months after certificate they would have been foreclosed in their absence, but their right thereafter to sue on the covenant is not in that case contested. If they had adopted the second of the two alternatives, and had appeared in the proceedings and insisted on everything being done strictly, what would have been the practical result to them? They would have incurred certain costs which they might add to their security, and for which the mortgagor might he made liable if he took any steps to redeem, but is there any obligation by which the holder of an insufficient security is compelled to increase the amount owing on that security by incurring unnecessary costs, if he wants to preserve his right to proceed against his debtor on the covenant? It is conceded that if he incurs the costs and puts the prior incumbrancer to the expense of taking and verifying the accounts, although he never intends to redeem, he is still entitled to his remedy under the covenant, and I cannot see on principle why he should be placed in any worse position simply because he averts unnecessary delay and expense and says at once that he never intends to redeem and does not ask for an opportunity of doing that which he never intends to do. In the proceedings of 1904 it was open to the mortgagor, who was a party to them, to insist upon the accounts being taken and upon a proper time for redemption being provided, and the only effect of the conduct

of which complaint is now made was that the puisne incumbrancers abandoned their right to redeem, and, I must assume, did so because they were satisfied that it was a right of which they had no intention of availing themselves. I do not myself see how in so doing they in any way prejudiced the mortgagor, and accordingly, apart altogether from the form of the order with which I have already dealt, I do not think there is anything in the conduct of the mortgagees, leading to the making of the order, which disentitles them to sue on the covenant. I hold, therefore, that the right to sue on the covenant is subsisting.

The next question is whether the plaintiffs are entitled to maintain this action, having regard to the terms of the covenant which they are seeking to enforce. [His Lordship read the terms of the covenant, and continued:—] On behalf of the defendants it is alleged that the demand in writing, whether it be made by the company or by agents acting on behalf of the company, must be left at the mortgaged premises. On the whole I think that is the right construction. I think it would be almost nonsensical to read the covenant in this way, that the company might make the demand in writing without leaving it at the mortgaged premises, but that agents for the company could only make it effective by leaving it at the premises. I think, however, that construction cuts both ways, and on the whole I think it goes more against the defendants than in their favour, because, if that construction be right, it seems to me all the mortgagees had to do in order to enforce the covenant was to leave a demand in writing at the premises, quite irrespective of whether there was anybody on the premises representing the mortgagor, or whether the mortgagor was alive or dead, or whether, in fact, the premises still continued to be a public-house. The real object with which the covenant was so framed was to protect the mortgagees and to enable them to enforce the covenant without personal service by delivering the demand at premises of a character from which occasionally mortgagors are apt to absent themselves without reasonable cause. So reading it, the question is whether, first of all, there has been any demand, and, secondly, whether I ought to hold that it is an essential part of the demand that it should be made on the

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premises. I think that effect is given to the true intention of the parties to the deed by bringing home to the mortgagor, or persons claiming under her, that the mortgagees are demanding their money and are about to take proceedings to recover it. [His Lordship referred to the demands which had been made by letter, and continued :—] I think in substance the condition has been complied with, and that the action is well founded. It has been pressed upon me that this is a very hard case, but in determining this case I have only to determine the legal rights of the parties. So far I have dealt with the matter as though it were a claim against Mrs. Culver or her estate. In one sense it is a claim against her estate, because, whatever the plaintiffs recover, they cannot recover anything beyond that which now represents, or which has represented, the estate of Mrs. Culver. Her estate falls under two categories. First there is a sum of 3500*l.* representing the residuary personal estate ; that is primarily liable to discharge the debt : it is in the hands of five of the defendants, and as against each of those five defendants the plaintiffs say they are entitled to recover that portion of the residuary estate which found its way to each of them. In that I think they are right. Then, further, there is some real estate of the value of 2500*l.* ; that is in the hands of various other defendants, and to the extent to which the residuary personal estate is insufficient to pay the debt of the plaintiffs they are entitled to follow the real estate and by process of law to realize, if they can, the balance of their debt out of it. It appears, unfortunately, to be the case that if the whole of the residuary personal estate and also the whole of the real estate is taken it will not be enough to satisfy the debt, and accordingly the plaintiffs' claim will not be paid in full even if they recover and extend the whole of the estate left by the mortgagor. In my opinion they are entitled to such a judgment as will enable them to reach all the estate.

The material parts of the order subsequently drawn up are as follows :—

This Court doth declare that each of the defendants Frederick George Henry Abbott, Arthur William Abbott, Henry Octavius Abbott, Charles

Alfred Abbott, and Julia Florence Ballantine is liable to refund to the plaintiffs the sum of 749*l.* 2*s.* 11*d.* received by such defendant in respect of his or her share and interest of and in the residue of the testatrix's estate towards payment to the plaintiffs of the said sum of 7027*l.* 1*s.* 11*d.* so due to them as aforesaid. And this Court doth order that the plaintiffs do recover against each of the defendants Frederick George Henry Abbott, Arthur William Abbott, Henry Octavius Abbott, Charles Alfred Abbott, and Julia Florence Ballantine, the sum of 749*l.* 2*s.* 11*d.* accordingly, but as regards the defendant Julia Florence Ballantine such sum to be payable out of her separate property . . . . And it is ordered that the plaintiffs do recover against the defendants Frederick George Henry Abbott, Julia Florence Ballantine, Arthur William Abbott, and Julia Florence Ballantine, and Graham Keith, and Florence Isabel Clark, the sum of 3281*l.* 7*s.* 4*d.* (being the difference between the said debt of 7027*l.* 1*s.* 11*d.* and the total of the five sums of 749*l.* 2*s.* 11*d.* to be recovered as aforesaid) to be levied against the defendant Frederick George Henry Abbott of such lands and tenements (if any) as shall hereafter come to him in fee simple by hereditary descent from the testatrix, his late sister, and against the defendants Julia Florence Ballantine, Arthur William Abbott, and Julia Florence Ballantine, and Graham Keith, and Florence Isabel Clark, of the aforesaid several houses, messuages, and tenements which they have respectively by devise from the testatrix as aforesaid, and this judgment is to be without prejudice to the rights of the plaintiffs against any of the defendants who have aliened or otherwise dealt with the several houses, messuages, and tenements, devised by the testatrix's will, or their respective estates or interests therein under such will, and in the event of its hereafter appearing that the defendants or any of them have aliened or dealt with the said houses, messuages, or tenements, or their respective estates or interests therein, the plaintiffs are to be at liberty to apply for such order and judgment against the said defendants, or any of them, as they may be advised . . . .

Solicitors: *Linklater, Addison & Brown; G. & G. Keith.*

G. M.

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In re WHITELEY.
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[1909 W. 3443.]

Will—Construction—Charitable Trust—"Site"—Trustees—Decision of Majority binding Minority.

A testator, after appointing trustees for the general purposes of his will, directed them, out of the proceeds of sale of his residuary real and personal estate, to set apart and appropriate a sum amounting as nearly as might be to 1,000,000*l.*, and to pay the same to the plaintiff and others, to be called the "W. H. trustees," who should stand possessed of the same upon trust from time to time to lay out a sufficient part of the said trust legacy in the purchase of freehold "lands situate in some or one of the western suburbs of London, or in the adjacent country," to be selected by the W. H. trustees "as a site" for the erection of buildings to be used as homes for aged poor persons and to be called "Whiteley Homes for the aged poor," or by such other name or names as the W. H. trustees should think fit, but so that the name of "Whiteley" should form part of such name or names. The will contained further directions that the "site" to be selected should be in a bright and healthy "spot," even if "such a site" could only be acquired at additional expense. The W. H. trustees were also given a very wide discretion in determining the name of the homes and administering the trust generally, and their minimum number was to be nine. Upon a summons taken out by eight out of the ten trustees against the other two trustees:—

Held—(1.) that upon the true construction of the will the W. H. trustees were not entitled to select more than one site for the homes.

(2.) That the rule stated in *Wilkinson* v. *Malin*, (1832) 2 Tyrw. 544, 571, that in the administration of a trust of a "public" nature the act of the majority was to be treated as the act of the whole body, applied equally to a trust of a "charitable" nature; and therefore, in selecting a site and in founding the homes, the decision of the majority of the W. H. trustees was binding upon the minority.

Adjourned Summons.

By his will, dated May 20, 1904, William Whiteley, of Westbourne Grove, Bayswater, in the county of London, appointed his two sons, the defendants William Whiteley and Frank Ernest Whiteley, and three other gentlemen to be his executors and trustees for the general purposes of his will, and, after giving numerous charitable and other legacies and bequests, he devised and bequeathed all his residuary real and personal estate to his

general trustees upon trust for sale and conversion, and out of the proceeds and ready money to pay his funeral and testamentary expenses, debts, and legacies, and he declared that his general trustees should "at such time or times, and from time to time as they or he shall think fit, but nevertheless as soon after my death as circumstances will permit . . . . set apart and appropriate out of the residue of the moneys to arise from such sale and realization, a sum or sums amounting as nearly as may be in the whole to but not exceeding the sum of 1,000,000*l.* sterling, such sum or sums to be held upon the trusts hereinafter declared concerning the same."

By clause 30 of the will the testator declared that the general trustees should stand possessed of the said sum of 1,000,000*l.* upon trust to pay the same to the plaintiff the Right Honourable and Right Reverend Arthur Foley Winnington-Ingram, D.D., Lord Bishop of London, and seven other gentlemen, of whom his sons the respondents William Whiteley and Frank Ernest Whiteley were the last two, and who, and also any additional trustees or trustee (not exceeding three) to be appointed as next thereinafter mentioned, were referred to as "the Whiteley Homes trustees," who should stand possessed of the said trust legacy of 1,000,000*l.* upon the trusts thereafter declared.

Clause 31 of the will was as follows: " The Whiteley Homes trustees shall stand possessed of the said trust legacy of 1,000,000*l.* upon the trusts and subject to the powers and provisions following (that is to say) Upon trust from time to time to lay out a sufficient part, or sufficient parts of the said trust legacy of 1,000,000*l.* in the purchase of lands of freehold tenure situate in some or one of the western suburbs of London, or in the adjacent country, and, if possible and convenient, within ten miles of Charing Cross, and to be selected by the Whiteley Homes trustees as a site for the erection thereon of buildings to be used and occupied as homes for aged poor persons and to be called 'Whiteley Homes for the aged poor,' or by such other name or names as the Whiteley Homes trustees shall in their discretion think fit, but so that the name of 'Whiteley' shall form part of such name or names. And I declare it to be my wish that the site to be selected by

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the Whiteley Homes Trustees for the said homes shall be in as bright, cheerful, and healthy a spot as possible, even if such a site can only be acquired at additional expense, and that in selecting such site the Whiteley Homes trustees shall, so far as may be, avoid a heavy clay soil and choose a soil of gravel, sand, or chalk. And I empower my general trustees or trustee, at the expense of my residuary estate to make or concur with the Whiteley Homes trustees in making such application or applications from time to time, or at any time to the High Court of Justice under the provisions in that behalf contained in the Mortmain and Charitable Uses Act, 1891, or otherwise, as may be necessary or expedient in order to obtain the sanction of the Court to the purchase or acquisition, and retention of land to be used as a site for the erection of buildings to be used or occupied for the purposes aforesaid."

Clause 32. "I declare that the Whiteley Homes trustees shall lay out a further sufficient part or further sufficient parts of the said trust legacy of 1,000,000*l.* in the erection on the lands so to be purchased or acquired as aforesaid of buildings to be used and occupied by aged poor persons of either sex as homes in their old age, under and subject to such regulations and provisions as are hereinafter contained."

By clause 33 the testator declared it to be his wish that the buildings to be erected for the homes should be of good and substantial character, and of a plain and useful design, and should be well lighted, ventilated, and drained, and so placed as to be protected from north and east winds, and that an outdoor shelter should be provided as part of the said buildings.

Clause 38. "The Whiteley Homes trustees shall have full and absolute discretion as to determining the name by which the said homes shall be called or known (but so that the name of 'Whiteley' shall form part of such name) the time and manner of election of the first inmates of the said homes, and the duration of the residence of any inmate therein (the Whiteley Homes trustees being expressly empowered and authorized to discharge and remove any such inmate in their discretion, without assigning any reason for the exercise of such discretion) and generally as to all matters and questions arising with respect

to the conduct and management of the said homes, but subject to the exercise of such discretion they shall, as soon as conveniently may be, after my death frame general rules and regulations for the management and conduct of the said homes, and generally for the administration of the trusts of this my will declared for the establishment and maintenance thereof, and the time, manner, and conditions of election and discharge of inmates thereof, as to all which matters and all other matters and questions I declare that the Whiteley Homes trustees shall have full and absolute discretion."

Clause 46 dealt with the appointment of new trustees, and the testator therein stated it to be his wish that the number of the Whiteley Homes trustees should at all times be kept up to no less than nine.

Questions arose between the Whiteley Homes trustees as to the construction of the testator's will. A summons was accordingly taken out by the plaintiffs, being eight out of the ten existing trustees of the homes, against the two other trustees (the two sons of the testator) and the Attorney-General, asking (1.) whether, upon the true construction of the will, the homes must be erected on one single site in one particular locality, or whether the same might be erected on such one or more sites and in such localities (within the limits mentioned in the will) as the Whiteley Homes trustees might select; (2.) whether, in the selection of such site or sites, and generally in founding the said homes, the decision of the majority of the trustees was binding on the minority.

P. O. Lawrence, K.C., *Younger, K.C.*, and *Errington*, for the applicants. Upon the question of construction we rely upon the words enabling the trustees from time to time to lay out a sufficient part or parts of the 1,000,000*l.*, and the locality is to be "in some or one of the western suburbs." The testator thus contemplated that the money would not be spent all at once and the trustees have an absolute discretion. It is in keeping with the requirements of the will that several sites should be selected, and not that the whole 1,000,000*l.* should be spent upon one huge institution in which all should be collected.

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Secondly, on the point of law. In private trusts the rule is inflexible that all the trustees must concur in administering the trusts, but it is otherwise in the case of public and charitable trusts. In Lord Halsbury's Laws of England, vol. iv. p. 275, it is stated that in trusts of a public or charitable nature a majority of the trustees acting within the limits of the instrument of foundation may, as a rule, bind the minority.

So in Tudor on Charitable Trusts, 4th ed. p. 259, it is stated as a general rule that in a public or charitable trust a majority of trustees has power to bind the minority, and in Lewin on Trusts, 11th ed. p. 285, that where there are several trustees, and the trust is of a public character, the act of the majority is held to be the act of the whole number.

In the case of *Wilkinson* v. *Malin* (1) Lord Lyndhurst says that where trustees are appointed for the purpose of performing a trust of a public and general nature the act of the majority is the act of the whole.

Perry v. *Shipway* (2) is a case of a similar character. The majority, therefore, in the present case can bind the minority. It is unlikely that the nine or ten trustees would always agree.

Sargant, for the Attorney-General, supported the same view.

Buckmaster, K.C., and *A. R. Stephens*, for the two respondent trustees. On the point of construction it was clearly the wish of the testator to establish a charity associated with his name and memory, and one which would remain for all time a striking memorial of his generosity. The words of the will do not point to scattered homes here and there. The word "site" is used frequently, and the provisions which follow clause 31 in the will point strongly in favour of the view that it is to be one building on one site. Once it is built there is no reference to "buildings" or "sites" in the plural. The testator contemplated one large site, and the trustees are restricted to that.

On the second question we do not dispute the existence of the rule laid down with regard to public trusts, but we contend that this is not a public trust. The rule is limited to cases where the public, or certain particular members of the public, are affected by the action of the body administering the trust, and

(1) 2 Tyrw. 544, 571.

(2) (1859) 1 Giff. 1.

the two cases relied upon by the applicants were both cases of that character. It does not apply to a pure case of administering a charity such as this.

The only exceptions to the general rule that a majority of trustees cannot bind the minority are (1.) where it is a charitable trust of a public nature, and (2.) where there is a definite statutory provision such as occurs in s. 12 of the Charitable Trusts Act, 1869. The fact of this section being passed shews that otherwise the majority could not bind the minority. No argument can be based upon the number of the trustees here. There are cases which shew that there is no authority for the statement that in a general charitable trust the majority of trustees can bind the minority: *Younger* v. *Welham* (1); *Rex* v. *Whitaker*. (2)

In the present will private trustees are appointed by a private individual to administer a charity from which no doubt the public have some benefit, but it is none the less a private charity, and there is nothing to alter the ordinary rule of law applicable to trusts.

P. O. Lawrence, K.C., in reply. The law does not recognize any trusts as charitable unless they are of a public character: Tudor on Charitable Trusts, 4th ed. p. 37; *In re Beverley Charities* (3); *Ommanney* v. *Butcher*. (4)

A private trust is not a charitable trust, and if this is not a charitable trust, then it is bad altogether, as infringing the rule against perpetuities.

Cur. adv. vult.

Feb. 23. EVE J. Of the two questions raised upon this summons the one involves only the construction of a particular will; the other relates to a matter of more general importance. By the first question the Court is asked to determine whether, according to the true construction of the testator's will, the homes, for the erection and maintenance of which the testator so generously provided, must be erected on a single site, or whether it is open to the trustees at their discretion to select, within the limits imposed by the testator, more than one site for such erection.

(1) (1711) 3 Swans. 180n.
(2) (1829) 9 B. & C. 648.
(3) (1839) 9 L. J. (Ch.) (N.S.) 91.
(4) (1823) T. & R. 260.

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In approaching the consideration of this question the magnitude of the bequest, and the improbability (which the testator himself appreciated) of the whole sum being available at one and the same moment of time for payment to the trustees, must not be lost sight of, nor must the wish and intention of the testator —obvious throughout his will—that his benefactions of a public character should be permanently and prominently associated with his name, be disregarded.

I think it is impossible to read the will without coming to the conclusion that the testator was a man of strong individuality, the nature of whose charitable dispositions was in part determined by his wish therewith to identify his personality, and thereby to perpetuate his memory.

Bearing these matters in mind, and turning now to the clauses of the will dealing with the particular bequest under consideration, I think the use of such phrases as "from time to time" and "name or names," each occurring twice in clause 31, and of the word "lands" in the plural in clauses 31, 32, and 33, is consistent with either view urged before me. As I have pointed out, the testator contemplated that the bequest would probably be satisfied by periodical payments, and, apart from this, even if the whole legacy had been paid over in one sum, no one would expect the trustees to acquire by one purchase, or at one time, the whole of the land required for the trust—considerations which, in my opinion, are amply sufficient to account for the use of the expression "from time to time," and of the word "lands," and not "land." The alternative "name or names" is discounted by the use of the singular "name" in clause 38, where the question of nomenclature is particularly dealt with, and even as an alternative would not be inappropriately applied to a single aggregation of homes, some used for male and others for female inmates.

Treating the expressions with which I have now dealt as ambiguous, in the sense that they are not necessarily confined to either alternative, the majority of the trustees, who advocate what I may call the distributive construction, are forced to rely on the direction that the lands to be purchased are to be "situate in some or one of the western suburbs of London, or in the

adjacent country," as establishing their contention. I say this because, in my opinion, all that follows in the will relating to this trust is more indicative of a single site than of a multiplicity of sites. Am I justified in holding, as a matter of construction, that these indications are controlled by the direction above referred to? On the whole, I do not think that I am, and very largely for this reason, that the testator directs the purchase of lands in some or one of the western suburbs or in the adjacent country to be made as "a site" for the homes—not, be it observed, as "a site or sites," but as a site for that which I believe he contemplated should be a conspicuous and concentrated memorial of his charity. It may be that the word "or" has inadvertently crept in between the words "some" and "one" in the direction, but construing the phrase as it stands I think it may well be that it was used in order not to tie the hands of the trustees within too restricted limits, and to leave them free, so long as the homes are situated in the western suburbs, to disregard the exact physical boundaries of any particular suburb.

I hold, therefore, that the trustees are not entitled to select more than one site for the homes, and I do not accede to the suggestion that such a construction involves the erection of a gigantic and inhospitable institution. It is, in my opinion, quite consistent with the laying out of an attractive and cheerful aggregation of houses wholly suitable for the purposes contemplated by the testator.

The second question in the summons raises the point whether, in matters relating to the administration of the trust, a majority of the trustees has power to bind the minority. By clause 38 of the will a very wide discretion is vested in the trustees, not only upon all matters relating to the management and conduct of the homes, but also upon all other matters and questions affecting the trust, and by clause 46 the testator fixes the minimum number of trustees at nine. On behalf of the applicants it is urged that unanimity in such a body upon all matters of detail is unattainable, and that the Courts have long since recognized this fact, and in order to facilitate administration and avoid the expense and delay of frequent

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applications for their intervention have laid down a rule that in the administration of a public trust the act of the majority of the trustees is to be treated as the act of the whole body. In support of this proposition the cases of *Wilkinson* v. *Malin* (1) and *Perry* v. *Shipway* (2) are cited and relied upon.

The respondents do not dispute the existence of the rule, but maintain that its applicability is limited to cases in which the act of the body is an act in which the public or the particular members of the public affected by the trust have a direct interest—for example, the appointment of a minister or a schoolmaster; that is to say, the appointment of a person to discharge the duties of an office, the proper discharge of which is a matter of direct interest to that part of the public which is represented in the one case by the congregation and in the other by those who are entitled to the educational benefits of the school. They deny that the rule has any application to matters of administrative detail and assert that there is no authority for holding that it has. It is true that the authorities referred to by the applicants are both concerned with the appointment of a person to discharge the duties of an office of a public nature, but I cannot read the observations of Lord Lyndhurst (3) as limiting the principle there stated to the particular class of case with which he was there dealing; and I think when he speaks of "a trust of a public nature" he is using an expression equivalent for all practical purposes to "a trust of a charitable nature." In other words, I regard the words "public" and "charitable" in this connection as synonymous, and, so regarding them, I think that the rule on which the applicants rely is of general application, and that I ought to answer the second question (omitting the words "or sites") in the affirmative. The costs of all parties will be taxed as between solicitor and client and paid out of the trust legacy.

Solicitors: *Baileys, Shaw & Gillett; Beyfus & Beyfus; Treasury Solicitor.*

(1) 2 Tyrw. 544. (2) 1 Giff. 1.
(3) 2 Tyrw. 571.

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[1909 P. 2341.]

Marriage Settlement — Agreement to settle Wife's after-acquired Property— Gift from Husband to Wife—Volunteers—Next of Kin claiming Benefit of Covenant—Trustees not bound to enforce Transfer.

By a marriage settlement made in 1878 certain funds coming from the wife's father were settled upon the usual trusts of a wife's fund, with an ultimate trust, in the events which happened, for the wife's statutory next of kin. And it was also agreed that all real and personal property to which the wife was entitled at the date of the marriage, or to which she, or her husband in her right, at any time during the coverture, should be or become entitled, whether in possession, reversion, or otherwise, should be assured and transferred by the husband and wife respectively to the trustees to be held upon the trusts of the settlement.

In August, 1884, a sum of 1018*l.* 15*s.* was invested by the husband in the purchase of certain stock in the name of the wife. This was subsequently sold by the wife and reinvested in the purchase of 1125*l.* Grand Trunk Railway of Canada 4 per cent. debenture stock, which remained registered in her name down to the date of her death, intestate, and without leaving any issue, on February 2, 1909. The stock was now standing in the name of the husband, to whom letters of administration to his wife's estate had been granted:—

Held, that the stock in question, which was a gift by the husband to the wife, was caught by the agreement to settle the wife's after-acquired property.

In re Ellis's Settlement, [1909] 1 Ch. 618, followed.

But *held*, on the authority of *Spickernell* v. *Hotham*, (1854) Kay, 669, that no action could be brought by the trustees to recover damages against the husband or the estate of the wife.

Held, also, that the next of kin of the wife, being volunteers and strangers to the marriage consideration, could not enforce the contract to settle as against the administrator of the wife, and that therefore the trustees were not bound to take any steps to obtain a transfer of the stock.

In re D'Angibau (1880) 15 Ch. D. 228, followed.

Fletcher v. *Fletcher*, (1844) 4 Hare, 67, distinguished.

By a marriage settlement dated October 7, 1878, and made between Alice Piers Talman of the first part, Reginald Charles Edward Plumptre of the second part, and Elizabeth Talman, Walter Hawken Tregellas, and Arthur Underhill (the trustees) of the third part, being a settlement made in contemplation of the

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marriage of Mr. and Mrs. Plumptre, certain moneys, stocks, funds, and securities then comprising Mrs. Plumptre's interest in the residuary personal estate of her father were assured to the trustees subject to a life interest therein which determined in 1887, upon trust to pay the income thereof to the wife during the joint lives of husband and wife for her separate use without power of anticipation, and after the death of such one of them, the husband and wife, as should first die, to the survivor during his or her life, and after the death of the survivor upon trust as to both capital and income for the children and issue of the marriage as therein mentioned, and in default of a child of the marriage living to attain a vested interest the trustees were to hold the trust premises in trust for Mrs. Plumptre's appointees, or in default of appointment, in the event, which happened, of the husband being the survivor, for the wife's statutory next of kin as though she had died possessed thereof and without having been married; and it was thereby agreed and declared that all real and personal property (if any) not thereinbefore settled to which the wife at the date of the marriage (except a sum of 500*l.* therein mentioned), or to which she, or her husband in her right, at any time during her then intended coverture, should be or become entitled, whether in possession, reversion, or otherwise (except as therein mentioned), should, as soon as circumstances would admit, be assured and transferred by the husband and wife respectively and by all other necessary and proper parties (if any) unto, or be otherwise vested in the trustees, upon trust to get in and convert the same, and to stand possessed of the proceeds upon the trusts and with and subject to the powers and provisions thereinbefore declared and contained concerning the funds thereby settled.

In August, 1884, a sum of 1018*l.* 15*s.* was laid out by the husband in the purchase in the wife's name and for her use of 1000*l.* New Zealand 4 per cent. inscribed stock. In May, 1887, the wife sold this stock, and in the following December invested the proceeds in the purchase of 1125*l.* Grand Trunk Railway of Canada 4 per cent. debenture stock, which remained registered in her name at the date of her death intestate and without issue on February 2, 1909, and was now standing

in the name of the husband, to whom letters of administration to her estate and effects had been granted on August 21, 1909.

On November 26, 1909, the trustees of the settlement took out an originating summons asking, inter alia, (1.) whether, according to the true construction of the settlement, the sum of 1125*l.* Grand Trunk Railway of Canada 4 per cent. debenture stock standing invested in the name of Alice Piers Plumptre at the date of her death was bound by the trust for the settlement of her other and after-acquired property ; (2) whether, regard being had (*a*) to the fact that there was no issue of the marriage of the said wife, and (*b*) to the fact that in the events which had happened the persons who, on the death of the husband, would become absolutely entitled in possession to the premises subject to the trusts of the settlement, were volunteers, the trustees were bound to take any steps to enforce the transfer of the stock to them as such trustees.

The evidence as to the purchase of the stock in the wife's name was that in 1884 Elizabeth Talman, the mother of Mrs. Plumptre, sold a house belonging to her for 1100*l.*, and it was agreed between her and Mr. Plumptre that 1000*l.* of this money should be handed over to him, in consideration for which he agreed to pay Mrs. Talman an annuity of 60*l.* a year for her life and to make certain provision also for her sister. On receipt of the 1000*l.* Mr. Plumptre purchased in his wife's name 1000*l.* New Zealand 4 per cent. stock at a cost of 1018*l.* 15*s.* He provided the balance of 18*l.* 15*s.* over and above the 1000*l.*, which he told Mrs. Talman he never intended to keep for himself.

C. G. Church, for the trustees of the settlement.

P. O. Lawrence, K.C., and *W. R. Sheldon,* for the husband. There are three rules for the construction of covenants to settle after-acquired property, in the absence of express provisions to the contrary. (1.) The covenant will be limited to the period during coverture. (2.) It will not be applied to an annual payment. (3.) It will not be applied to gifts from the husband to the wife.

First, with regard to the gift here, which was made in 1884, it is altogether outside the scope of the covenant. The primary

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object of such a covenant is to protect the wife's property from her husband. The principle which governs this case was laid down by Malins V.-C. in the case of *Dickinson* v. *Dillwyn* (1), where there was a joint covenant by husband and wife such as there is here, and the words of the covenant covered any property coming to the wife. The principle there laid down has prevailed down to 1909 and was followed in the cases of *Carter* v. *Carter* (2), *In re Edwards* (3), *Coles* v. *Coles* (4), and in the Irish case of *Kingan* v. *Matier* (5), where the covenant was almost exactly similar to the covenant here.

No doubt the decision of Swinfen Eady J. in *In re Ellis's Settlement* (6) is the other way, but it is contrary to the generally accepted view of the object of these covenants. In that case Swinfen Eady J. followed the rule stated by Cotton L.J. in *Scholfield* v. *Spooner* (7) to the effect that the Court had but to construe the covenant and give effect to it apart from any guess at the real intention of the parties. But in the present case the covenant, which is different in terms, does not fit the gift, although it may come literally within the words of the covenant. The obligation here is joint throughout. The actual transaction must be looked at to see if the covenant applies: *In re Dunsany's Settlement.* (8) There is no distinction in substance between *In re Ellis's Settlement* (6) and *Coles* v. *Coles.* (4)

In the latter case Joyce J. decided, upon the broad ground of intention, that the words of the covenant never could have been intended to apply to property which the wife should acquire from her husband. The covenant, therefore, does not apply at all to this gift from the husband.

Secondly, if it does come within it, then the next of kin, who are entitled on the death of the husband, are mere volunteers and cannot enforce it. They are complete strangers to the contract and the consideration. That has been decided by a long line of cases: *Mackie* v. *Herbertson* (9); *In re Cameron and*

(1) (1869) L. R. 8 Eq. 546.
(2) (1869) L. R. 8 Eq. 551.
(3) (1873) L. R. 9 Ch. 97.
(4) [1901] 1 Ch. 711.
(5) [1905] 1 I. R. 272.
(6) [1909] 1 Ch. 618.
(7) (1884) 26 Ch. D. 94, 100.
(8) [1906] 1 Ch. 578.
(9) (1884) 9 App. Cas. 303.

Wells (1); *De Mestre* v. *West* (2); *Attorney-General* v. *Jacobs Smith* (3); *Colyear* v. *Countess of Mulgrave* (4); *Jefferys* v. *Jefferys* (5); *Gale* v. *Gale* (6); *In re D'Angibau* (7); *In re Anstis.* (8) The last two cases really govern the present and conclusively establish that the next of kin are volunteers; they are not cestuis que trust, or within the marriage consideration.

Lastly, there has been no absolute assignment of this stock The contract is executory. If the covenant operated at all it operated as a contract to assign if and when the interest fell in: *Paul* v. *Paul* (9); *Green* v. *Paterson* (10); *Collyer* v. *Isaacs* (11); *In re Ellenborough.* (12)

Clayton, K.C., and *L. T. Ford*, for the next of kin. The first two suggested rules for construing covenants of this nature are not disputed. But as to the third, our contention is that the covenant is applicable to a gift by the husband to his wife on authority and also apart from authority. On the question of fact we say that it was not really a gift by the husband at all; it was the result of a bargain between the husband and his mother-in-law, from whom the money came. It was not the money of the husband to give. As a result of the bargain the wife became entitled to the money. But, assuming that there is a pure gift by the husband to the wife, the intention of the husband is wholly immaterial; it is only a question of the construction of the actual words in the covenant: *Scholfield* v. *Spooner.* (13) The gift comes clearly within the literal words. The other cases relied upon by the husband are distinguishable, whereas this case is indistinguishable from *In re Ellis's Settlement.* (14) The gift is therefore caught by the covenant.

With regard to the right to enforce this covenant, none of the authorities go to the length contended for. It was the duty of the trustees to enforce the covenant, and when enforced it would have enured for the benefit of the volunteers. The trustees

(1) (1887) 37 Ch. D. 32.
(2) [1891] A. C. 264.
(3) [1895] 2 Q. B. 341.
(4) (1836) 2 Keen, 81.
(5) (1841) Cr. & Ph. 138.
(6) (1877) 6 Ch. D. 144.
(7) 15 Ch. D. 228.
(8) (1886) 31 Ch. D. 596.
(9) (1882) 20 Ch. D. 742.
(10) (1886) 32 Ch. D. 95.
(11) (1881) 19 Ch. D. 342.
(12) [1903] 1 Ch. 697.
(13) 26 Ch. D. 94.
(14) [1909] 1 Ch. 618.

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could not be in any worse position because they would not be the objects ultimately to be benefited. That is the true answer to the cases cited. We assert four propositions on this part of the case. First, the next of kin are not, on the true construction of this settlement, volunteers for the purpose of enforcing the covenant against the husband. Secondly, even assuming that the next of kin are volunteers, the trustees were parties to the covenant and have a right at law to enforce it. There is no necessity to resort to the equitable doctrine as to the executory trust. Thirdly, the next of kin are cestuis que trust under this instrument. Fourthly, regard must be had to the position in August, 1884, when this contract became enforceable. The wife, being restrained from anticipation, could not have waived her rights. There could have been no answer then to an action by the trustees to bring this sum into settlement; and once brought into settlement, it would have enured for the benefit of volunteers: *Ellison* v. *Ellison* (1); *Davenport* v. *Bishopp.* (2)

The case of *Fletcher* v. *Fletcher* (3) is conclusive in our favour on the second proposition. There a trust was enforced in favour of volunteers. There is a right at law in the trustees to enforce this covenant. Where there is such a right the Court of Equity will regard as done that which ought to have been done: *Green* v. *Paterson* (4); *In re Reis.* (5)

P. O. Lawrence, K.C., in reply on the question whether the trustees were bound to take any steps. In *Fletcher* v. *Fletcher* (3) there was an executed agreement which equity enforced, but in the present case it is not executed but executory. There is absolutely no right at law in the trustees to sue the husband for damages; the Statute of Limitations would have been a complete bar to any such action, and it would necessarily be unsuccessful. The case of *In re Anstis* (6) is conclusive that the doctrine that equity looks upon that as done which ought to be done cannot be invoked by a volunteer as against one who has a legal right. It is not a rule which is universally true.

Cur. adv. vult.

(1) (1802) 6 Ves. 656.
(2) (1843) 2 Y. & C. Ch. 451; (1846) 1 Ph. 698.
(3) 4 Hare, 67.
(4) 32 Ch. D. 95.
(5) [1904] 2 K. B. 769.
(6) 31 Ch. D. 596.

Feb. 24. EVE J., after stating the terms of the settlement and the transactions with the stock in the wife's name, continued:—By this summons the trustees of the settlement ask the opinion of the Court whether the stock so standing invested in the name of the wife at her death was bound or affected by the trusts for the settlement of the wife's other and after-acquired property. The husband, who is the first respondent, asserts that the money with which the original stock was purchased was a gift from him to his wife, and contends that such gifts are outside the scope of covenants to settle a wife's after-acquired property. The other respondent, Mrs. Ford, is joined as one of, and as representing, the wife's next of kin, and on her and their behalf it is argued, first, that the transaction of 1884 was not in fact a gift by husband to wife, and, secondly, that even if it was, the covenant is clear and unambiguous and extends to such gifts.

Upon the question of fact I think that the husband's contention is right; 1000*l.* of the 1018*l.* 15*s.* invested in 1884 was received by the husband from his mother-in-law as the consideration for certain annuities which he undertook to pay, and although he never intended to keep the 1000*l.* for himself and told his mother-in-law so when the agreement for the purchase of the annuities was come to, I do not think, upon the evidence, that the purchase price came to his hands impressed with any trust for the wife or otherwise than as his own money. In my view, therefore, the investment in his wife's name was a gift from him to his wife.

The question then arises, is such a gift caught by the covenant? I agree that, if one regards the whole object of the marriage settlement to be the protection of the wife's property from the husband, it seems somewhat anomalous to extend its operation to such a gift; but it must not be overlooked that although the settlement may be primarily for the protection of the wife against the husband, it also is intended to protect the wife against herself and as far as possible to preserve intact the capital of her fortune for her issue. I cannot, therefore, accede to the suggestion that the intention to include gifts by husband to wife in an after-acquired property clause is so

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repugnant to the motives underlying the execution of the settlement as necessarily to lead to its rejection, and unless this view can prevail the question becomes one of construction only. So regarding it, I do not see how it is possible to hold that the covenant does not cover the gift in question, and on this part of the case I adopt and respectfully concur in the conclusion of Swinfen Eady J. in *In re Ellis's Settlement* (1) and the reasoning by which he reached it. It would serve no good purpose for me to follow him through the earlier cases, of which the nearest to the present case is the Irish decision in *Kingan* v. *Matier* (2), but I think they are all distinguishable from this case, and accordingly I answer the first question in the summons in the affirmative.

The second question in the summons as amended reads as follows: [His Lordship read the question, and continued.] Mr. Clayton, on behalf of the next of kin, does not admit that their position under the settlement is correctly stated in paragraph (*b*) of that question. He contends that they are not necessarily volunteers thereunder for the purpose of enforcing the covenant against the husband, and further that, even assuming the facts to be as stated in the question, the Court is not concerned to consider whether his clients could obtain the performance of the covenant by proceedings in equity inasmuch as the applicants, parties to the contract, are trustees of the covenant for all their cestuis que trust, and can and ought to enforce it by action at law, that is to say, by an action to recover as damages for breach of the covenant a sum equal to the value of the property which would have been vested in them had the covenant been complied with. I will deal with this latter contention first. Could such an action at law be successfully maintained to-day? I do not think it could. The covenant is an executory covenant, of which there was a clear breach in 1884, and although it is a continuing breach in the sense that it still exists, the cause of action arose in, or shortly after, August of that year. In these circumstances I think the case of *Spickernell* v. *Hotham* (3) is an authority for saying

(1) [1909] 1 Ch. 618. (2) [1905] 1 I. R. 272.
(3) Kay, 669, 675.

that no action could now be brought by the trustees to recover damages against the husband or the estate of the wife. In that suit the estate of one George V. Drury was being administered; by the marriage settlement of one Eliza Thompson, to which the testator was a party, and which contained a recital that the testator, being desirous of making some provision for the said Eliza Thompson and the issue of the then intended marriage after the death of the survivor of himself and his wife, had agreed to transfer 962*l.* New 4 per cent. Annuities belonging to him to the trustees of the settlement upon the trusts hereinafter expressed, the testator, for himself, his heirs, executors, administrators, and assigns, covenanted with the said trustees that he, his executors or administrators, would, immediately after the solemnization of the marriage, transfer into their names the said annuities upon the trusts therein declared. The marriage took place, but the testator never transferred the annuities to the trustees of the settlement and died many years after. The exact date of his death does not appear in the report, but it does appear therefrom that he was still living in January, 1848. The trustees of the settlement brought in a claim under the covenant in the administration proceedings, and it was argued on their behalf, first, that it was a specialty debt and not barred by the statute, because, having regard to the fact that the testator reserved to himself a life interest in the fund, time did not begin to run against the claim until his death, and, secondly, that it was not a mere debt, but a trust, for the testator, having covenanted to transfer a certain sum of stock then belonging to him, was a trustee of the stock until he should transfer it according to his covenant. The Vice-Chancellor, Sir W. Page Wood, dealt with these contentions in the following terms: "This is like many other cases which occur upon the Statute of Limitations, a case of considerable hardship; but the Legislature having enacted that the lapse of a certain period shall bar the right to recover a debt, I can see nothing in this case to take it out of the operation of the statute. The debt in question is a legal debt, which accrued in 1828 in respect of a breach of covenant by the omission to transfer a sum of stock into the names of trustees which ought

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then to have been done." Then, after dealing with a matter that does not arise in this case, he says: "The cestuis que trust could not get at the fund in any other way than by an action to be brought by the trustees: therefore it is not in any sense a trust on the part of the testator, and the action upon the covenant is now barred by the statute." I think that last paragraph must be read with some qualification (see the case of *Burrowes* v. *Gore* (1)), but that point is really not material when I am considering only the legal remedy of the trustees, and I think the case is an authority for saying that in this case the statute could be successfully pleaded as a bar to such remedy. To the like effect is *Stone* v. *Stone.* (2)

The result, therefore, is that the next of kin, if they are entitled to any relief, must resort to this Court to obtain it.

Now what is their position here? They are not in my opinion cestuis que trust under the settlement, for nothing therein amounts to a declaration of trust, or to anything more than an executory contract on the part of the husband and wife; it is, so far as the next of kin are concerned, what Cotton L.J. calls a voluntary contract to create a trust as distinguished from a complete voluntary trust such as existed in the case of *Fletcher* v. *Fletcher* (3), on which Mr. Clayton so strongly relied. The collaterals are no parties to the contract; they are not within the marriage consideration and cannot be considered otherwise than as volunteers, and in these respects it makes no difference that the covenant sought to be enforced is the husband's and that the property sought to be brought within it comes from the wife. For each of the foregoing propositions authority is to be found in the judgment of the Court of Appeal in *In re D'Angibau* (4); and in the same judgment is to be found this further statement—that where, as in this case, the husband has acquired a legal title as administrator of his wife to property which was subject to the contract to settle, volunteers are not entitled to enforce against that legal title the contract to create a trust contained in the settlement. I think that judgment really

(1) (1858) 6 H. L. C. 907.
(2) (1869) L. R. 5 Ch. 74.
(3) 4 Hare, 67.
(4) 15 Ch. D. 228.

disposes of the second question upon this summons, but before answering it, as I propose to do, in the negative, I ought perhaps to add that the argument founded on the rule that equity looks on that as done which ought to be done is, in my opinion, met and disposed of by what Lindley L.J. says in *In re Anstis.* (1) After stating the rule he adds: "But this rule, although usually expressed in general terms, is by no means universally true. Where the obligation to do what ought to be done is not an absolute duty, but only an obligation arising from contract, that which ought to be done is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it."

I therefore answer the second question by saying that the applicants are not bound to take any steps, and I order the costs of all parties to be taxed as between solicitor and client, and to be raised and paid out of the capital of the funds now subject to the trusts of the settlement.

Solicitors: *Lovell, Son & Pitfield; Mead & Co.*

(1) 31 Ch. D. 596, 605.

G. M.

JOYCE J.
1910
Feb. 2, 3, 23.

MORGAN *v.* JEFFREYS.

[1909 M. 854.]

Mortgage—"Clog" on Redemption—Public-house—"Tie"—Restrictive Covenant by Mortgagor—Proviso against Redemption without Consent of Mortgagee for Twenty-eight Years.

In 1896 a lessee of land on which he had built a hotel mortgaged it to a brewer to secure 5500*l.* and interest, and covenanted to buy all beer and other liquors consumed at the house from the mortgagee for a period of twenty-eight years and so long after as any money should remain due upon the security. The deed also provided that the mortgagor should not be entitled to pay off the mortgage before 1924 without the consent of the mortgagee. There was a power of sale without notice upon the happening of any one of numerous events, and upon a sale under the power the purchaser might be required to take a conveyance subject to the "tie." In an action by the mortgagor to redeem the mortgage:—

Held, that the proviso against redemption for twenty-eight years, even if it might be supported in a case where there was a similar provision against calling in the mortgage, exceeded all reasonable limits and could not be enforced.

Trial of Action.

This was an action commenced by a mortgagor and continued by his widow and executrix claiming redemption of the mortgage against the representatives of the mortgagee. The mortgage was created by an indenture dated May 4, 1896, and made between Henry Morgan of the one part and Thomas Jones, a brewer, of the other part. Morgan, who was a man of no education, having formerly been a miner, had acquired a long lease of a piece of land at Llanwonno, in Glamorganshire, upon which he had erected a hotel known as the Mount Pleasant Hotel, Mountain Ash. By the above-mentioned indenture Morgan mortgaged the hotel to Jones to secure the repayment of the sum of 5500*l.* and interest. It was thereby agreed that the power of sale conferred upon mortgagees by the Conveyancing and Law of Property Act, 1881, should arise and be immediately exercisable not only in the cases provided for by s. 20 of the same Act, but all moneys secured by the mortgage should immediately become payable, and the said power of sale should arise and become immediately

exercisable in the event of Morgan becoming subject to or attempting to take the benefit of any bankruptcy law or Act for the relief of insolvent debtors for the time being in force, or in the event of any breach, non-observance, or non-performance of either of the covenants, agreements, stipulations, or conditions in certain indentures of lease therein referred to and on the part of the lessee to be observed or performed, or in the event that Morgan should without the consent in writing of Jones assign, underlet, demise, charge, encumber, or part with the possession of the hotel or premises, or if Morgan should die or cease personally to reside in the hotel, or become personally incapable of conducting the business thereof, or if Morgan or other the occupier of the hotel should neglect to keep the same licensed premises open during all lawful hours, or fail to conduct and manage the business thereof in a proper and orderly manner, or fail or neglect to apply at all proper times for the necessary licences or to pay the costs thereof, or if Morgan or other the occupier of the hotel should be convicted of any one offence under the Licensing Acts. And it was thereby declared that s. 18 of the Conveyancing and Law of Property Act, 1881, should not apply to the mortgage, and that upon the exercise of the power of sale it should be lawful for Jones to require the purchaser of the hotel to enter into such covenants and to take the conveyance of the same subject to such stipulations as should bind such purchaser and his successors in title with regard to the trade of the hotel in such manner as Morgan was bound by virtue of the provisions therein contained, and it was thereby agreed that Morgan should not be entitled to pay off the said sum of 5500*l.* or any part thereof before January 13, 1924, unless Jones should be willing to receive the same earlier. By the same deed Morgan covenanted with Jones that for the space of thirty-one years from January 13, 1893, and for so long afterwards as any money secured by the mortgage should be due, Morgan, his executors, administrators, or assigns, would purchase from and deal exclusively with Jones, his executors, administrators, or assigns, or his or their nominee or nominees, at the prices mentioned in the schedule thereto for all ale, beer, porter, and other malt liquors whatsoever, and also for all wines, spirits, and cordials which

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should be sold or consumed or made use of in and upon or about the hotel.

The mortgage was prepared by a solicitor who apparently acted for both parties.

Thomas Jones died in 1908, having by his will appointed the defendants Jeffreys and Williams executors thereof.

On March 4, 1909, the defendants the executors purported to sell by auction to the defendants James and Leyshon the right to supply the hotel with all malt liquors, wines, spirits, and cordials for the period mentioned in the mortgage for the sum of 3000*l.* On March 11, 1909, Morgan tendered to the executors of Jones the sum of 5733*l.* 3*s.* 9*d.*, being the principal sum due on the mortgage with interest to date and interest in lieu of notice. The executors refused to accept the tender and claimed that Morgan was not entitled to redeem the security. On April 15, 1909, the writ in the action was served.

Henry Morgan died on May 21, 1909, having by his will appointed the plaintiff Sarah Morgan his executrix, by whom the action was continued.

Hughes, K.C., and *C. W. Turner*, for the plaintiffs. First, we say that the provision in this mortgage that the mortgagee shall not be entitled to pay off the mortgage debt for twenty-eight years and the provisions relating to the tie constitute a clog upon the equity of redemption and cannot therefore be enforced; and, secondly, the whole transaction is of such a nature that it cannot stand as between mortgagor and mortgagee.

There is no reported case in which a restriction for more than seven years on the right to redeem has been held good. In *Teevan* v. *Smith* (1) Jessel M.R. said: "The law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years"; and in *Biggs* v. *Hoddinott* (2) a provision for the continuance of the loan for five years was held good. But in the present case, where there is not even any corresponding obligation on the part of the mortgagee not to call in the mortgage money, the restriction upon redemption for a period of

(1) (1882) 20 Ch. D. 724, 729. (2) [1898] 2 Ch. 307.

twenty-eight years is altogether unreasonable and bad: *Talbot* v. *Braddill* (1); *Cowdry* v. *Day* (2); *Bradley* v. *Carritt.* (3)

Further we submit that all the provisions relating to the tie are unreasonable and cannot be enforced: *Noakes & Co.* v. *Rice* (4); *Bradley* v. *Carritt* (3); *Browne* v. *Ryan.* (5) In *Biggs* v. *Hoddinott* (6) all the judges guarded themselves by saying that provisions of this kind must be perfectly reasonable in order to be good.

Buckmaster, K.C., and *Tomlin*, for the defendants. There was nothing oppressive or unreasonable in this transaction. The mortgagor was not otherwise than a capable and intelligent man acting under the advice of a solicitor, who acted for both mortgagor and mortgagee and explained the deed to them both. The proviso as to redemption is not such a clog as to invalidate the mortgage.

Cowdry v. *Day* (2) and *Talbot* v. *Braddill* (1) are not authorities for such a contention. The latter case ended in a compromise. *Cowdry* v. *Day* (2) was a case of solicitor and client and the term was twenty years. There is no principle which fixes the period of redemption.

There is no rule of equity which prohibits the limitation of the right to redeem. A mortgage may be made irredeemable for a reasonable period: *Teevan* v. *Smith* (7); *Biggs* v. *Hoddinott.* (6) The question in each case is whether the limited period is under the circumstances reasonable: *Ramsbottom* v. *Wallis* (8); *In re Hone's Estate.* (9)

It is quite common to limit the time for the redemption of the debentures of a company. For that purpose a company is in the same position as an individual, and the relationship between a company and its debenture-holders is that of mortgagor and mortgagee: Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 103.

There is nothing in *Bradley* v. *Carritt* (3) to support the proposition that there can be no limitation of the right to redeem. In *Noakes & Co.* v. *Rice* (4) Lord Davey sums up the doctrines

(1) (1683) 1 Vern. 183, 394.
(2) (1859) 1 Giff. 316.
(3) [1903] A. C. 253.
(4) [1902] A. C. 24.
(5) [1901] 2 I. R. 653.
(6) [1898] 2 Ch. 307.
(7) 20 Ch. D. 724, 729.
(8) (1835) 5 L. J. (Ch.) (N.S.) 92.
(9) (1873) Ir. R. 8 Eq. 65.

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of equity relating to this branch of law under three heads. The mere postponing of the right to redeem does not come within either of those heads. Assuming that the right to redeem has not yet arisen, the provisions of the deed do not purport to extend the "tie" beyond the existence of the mortgage. They are not therefore bad. They do not constitute a clog: *Santley* v. *Wilde*. (1)

Again, in selling the exclusive right to supply the hotel with malt and other liquors the defendants were not exercising the power of sale so as to give rise to the right to redeem. That was no part of the security. It was only an inducement to the mortgagee to advance the money upon the terms agreed upon. [They also referred to *Brown* v. *Cole* (2) and Coote on Mortgages, 7th ed. p. 13.]

Adams, for the defendants James and Leyshon, took no part in the argument.

Hughes, *K.C.*, in reply.

JOYCE J. This is an action for redemption instituted by the mortgagor, now deceased, against the representatives of the mortgagee. The mortgage is dated May 4, 1896; the amount secured was 5500*l.* with interest at 5 per cent. The principal part of the mortgaged property was a public-house or hotel, and the mortgage was a mortgage to a brewer. There are stipulations in the mortgage constituting what is known as a tie of the most stringent character in terms not merely during the continuance of the security, but for thirty-one years from January 13, 1893, that is until 1924, and so long after as any money should remain due upon the security. There is a clause with a proviso that the mortgagor shall not be entitled to pay off the principal sum of 5500*l.*, or any part thereof, before January 13, 1924, unless the mortgagee should be willing to receive the same earlier. Then there is a power of sale of a somewhat extraordinary character. [His Lordship referred to the provisions of the deed with regard to the power of sale, and continued:—] There is another extraordinary thing with reference to the power of sale, namely, a provision that upon the exercise by the mortgagee of the power

(1) [1899] 2 Ch. 474. (2) (1845) 14 Sim. 427.

of sale it should be lawful for the mortgagee to require the purchaser to take a conveyance subject to the tie, or, in other words, the sale might be subject to the tie still subsisting for the benefit of the mortgagee after the sale. According to the literal interpretation the mortgagee might apply the proceeds of sale in part or in full payment of the mortgage debt and interest, and retain the benefit of the tie as against the purchaser under the power of sale.

The mortgagee having died, his representatives proceeded to wind up and realize his estate. He had many public-house properties, and they advertised these for sale, and amongst other properties they advertised for sale as a separate lot the exclusive right of supplying this hotel and premises with ale, and so on, for the residue of the term of thirty-one years, which is the term I have mentioned from January 31, 1893, and for so long afterwards as any money should remain owing on the mortgage. If this was an attempt to sell part of the mortgaged premises, as at present advised, I think that must at once let in the mortgagor, or his representatives, to redeem, for it was not contended before me, nor do I think it could be seriously contended, that the mortgagee could sell the mortgaged premises, or part of them, while at the same time refusing to allow redemption. Subsequently, I suppose, to this advertisement, namely, on February 26, 1909, the mortgagor gave notice to pay off, and on March 4, 1909, the properties I have mentioned were put up for sale, and this one lot was sold by auction to a purchaser or purchasers for 3000*l.*, and the persons who purchased, James and Leyshon, have been added by amendment as defendants in this action. This is, to my mind, very much like a sale of a part of the mortgaged premises.

On March 11, 1909, the mortgagor made a tender of the principal and interest, and six months' interest in lieu of notice, and that being declined, on April 15, 1909, this action was brought. The statement of claim in paragraph 10 states the tender of the principal and interest, as I have mentioned, adding that the defendants refused to accept the sum so tendered, and claimed that the mortgagor, that is the plaintiff, was not entitled to redeem the security. The defendants, representatives of the

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mortgagee, by their defence in paragraph 8 deny that any of the provisions of the agreement are unconscionable, unreasonable, or oppressive, or a clog upon the equity of redemption, or that the plaintiff is entitled to redeem the premises notwithstanding such provisions. The question I have to determine is whether in the circumstances the plaintiff is, or the mortgagor was at the time of the tender, entitled to redeem notwithstanding the proviso in the mortgage that the mortgagor shall not be entitled to pay off the principal or any part thereof before the year 1924, unless the mortgagee should be willing to receive the same, and to have back the property unfettered by any tie.

The original transaction, in my opinion, was a mortgage and nothing else. The mortgagor was originally a working miner without education, but I do not think that is material, because the mortgage was prepared by a solicitor, and, strange to say, by the solicitor of the mortgagor, acting both for the mortgagor and mortgagee. The transaction being a mortgage, the first essential characteristic of a mortgage is the mortgagor's right to redeem. By the mortgagor's right to redeem, I mean that the mortgagor, notwithstanding any condition or stipulation to the contrary contained in the mortgage agreement, is entitled, on paying the mortgage debt with interest and costs, to call upon the mortgagee to retransfer to him the mortgaged premises and discharge him from all legal obligations arising out of the mortgage agreement. As Lord Macnaghten says (1), "Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption." This is an old principle, and is stated very clearly by Lord Lindley in a passage which is quoted by Lord Halsbury in *Noakes & Co.* v. *Rice* (2): "I do not know that there has been a more authoritative exposition of the rule which arises now than what my noble and learned friend there laid down: 'The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt, or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any

(1) [1903] A. C. 261. (2) [1902] A. C. 28.

provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void.'" That is the doctrine of equity notwithstanding and in spite of the terms of the deed. At law there is no right to redeem except at the time specified in the proviso for redemption which is usually coincident with the time at which the mortgage money is repayable under the covenant for repayment. Although that be the general rule of equity, nevertheless, no doubt, there are some limitations. There is a dictum of Sir George Jessel's in *Teevan* v. *Smith* (1), where he says, "For although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period such as five or seven years." Whether or not Sir George Jessel was there referring to a case where the provision as to not redeeming was mutual—that is to say, whether it was a case where not only was the mortgagor precluded from redeeming but the mortgagee was also precluded from calling in the money—is not very clear, but I think he was.

Now in *Biggs* v. *Hoddinott* (2), which was a case of a public-house, the provision as to continuance of the security was clearly mutual. It was there held by Romer J., as he then was, "that the provisoes for the continuance of the loan were valid, and that the mortgagors were not entitled at present to redeem." Against that part of the decision there was no appeal. What Romer J. said (3) was this: "I take it that what was said by Sir George Jessel in *Teevan* v. *Smith* (1) is good law, at any rate, so far as I am concerned, and, indeed, I trust good law in whatever Court the question may ultimately be raised, namely, that, 'Although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years.' The period in the present case is five years. Now, I am of opinion that it is obviously to the advantage of both the

(1) 20 Ch. D. 724, 729. (2) [1898] 2 Ch. 307.
(3) [1898] 2 Ch. 311.

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mortgagor and mortgagee that such a provision should be enforced. Of course, that does not prevent the Court in a proper case from preventing the application of the clause if it is too large, or there are circumstances connected with the proviso which render it, in the opinion of the Court, unreasonable or oppressive. In the present case I can find nothing unreasonable or oppressive in the proviso which prevents the mortgagor from redeeming for the five years. The term is not unreasonable, nor is there anything connected with the proviso which would render it unreasonable or oppressive in the eyes of the Court." In this case before Romer J. there was also a clause precluding the mortgagee from calling in the money, as I have already mentioned. In *Noakes & Co.* v. *Rice* (1) Lord Davey quotes the case of *Biggs* v. *Hoddinott* (2) and says that in his opinion that case was rightly decided. In the case of *Bradley* v. *Carritt* (3) Lord Macnaghten, speaking of *Biggs* v. *Hoddinott* (2), says: "*Biggs* v. *Hoddinott* (2) was a plain case. It purported to decide two things. In the first place, it purported to decide that a mortgage may be made irredeemable for a reasonable period. Well, everybody knows that when money was placed out on mortgage as an investment nothing was more common than to make the mortgage irredeemable for a certain limited time." Lord Davey says (4): "All that I understand to be decided in *Biggs* v. *Hoddinott* (2) is, first, that a stipulation for the continuance of a loan for five years was valid, and, secondly, that a covenant to take beer from the mortgagee limited to the continuance of the security did not clog the equity of redemption," and so on. Now whether or not Lord Macnaghten, in saying what he did say in that case of *Bradley* v. *Carritt* (3), was referring to a case where there were mutual provisions for the continuance of the loan, and not merely a proviso precluding the mortgagor from redeeming, is not clear. I rather think he was; and I observe that in the note at p. 330 of Mr. Davidson's book (Davidson's Precedents in Conveyancing, 4th ed. vol. ii. part ii.) there is this statement: "It is usually intended that both parties (mortgagee as well as mortgagor) shall be entitled to require the money to remain on the

(1) [1902] A. C. 33.
(2) [1898] 2 Ch. 307.
(3) [1903] A. C. 259.
(4) Ibid. 267.

security during the stipulated time." It is not the mortgagor as well as the mortgagee, but the mortgagee as well as the mortgagor, and it does appear to me that if that be not so, then a provision precluding the mortgagor from redeeming is altogether one-sided, and cannot possibly be for the benefit of the mortgagor. No doubt, as Lindley M.R. said in *Attorney-General* v. *Brighton & Hove Co-operative Supply Association* (1), it is often very difficult to draw the line, but it appears to me, having regard to the difference between five or seven years and twenty-eight years, and between a case where the provisions are mutual and where they are one-sided, as here, and looking at the position of the mortgagor, the character of the stipulations in this agreement, and the severity of the provisions for the benefit of the mortgagee, that this period of twenty-eight years, for which the deed purports to preclude the mortgagor from redeeming, if it could be good at all, in a case where there is not a similar provision as to the mortgagee not calling in the money, does exceed all reasonable limit, and I cannot understand how the mortgagor could have been allowed by his solicitor so to fetter himself. It appears to me to be impossible to justify the provisions in this deed, either on principle or authority, and I am of opinion that the clause in this deed as to not redeeming within twenty-eight years cannot be enforced. Of course, if it could be, there would still remain the question whether it could be enforced, having regard to what has been offered for sale and sold; but I need not deal with that, because, in my opinion, the provision precluding the mortgagor from redeeming cannot be enforced.

The result is that, in my opinion, the representative of the mortgagor, the present plaintiff, is entitled to redeem as at the date of the tender, notwithstanding the proviso which purports to preclude the mortgagor from so doing without the consent of the mortgagee.

Solicitors: *E. F. Turner & Sons, for Herbert George, Mountain Ash; Sharpe, Pritchard & Co., for Jeffreys & Powell, Brecon.*

(1) [1900] 1 Ch. 276, 282.

NEVILLE J.
1910
Feb. 23, 24.

In re WIMBLEDON OLYMPIA, LIMITED.

Company—Facts to be stated in Prospectus—Previous Offer of Shares—Remedy for Omission—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 81.

The mere fact that a prospectus issued by a company does not contain some of the facts or contracts required to be stated by s. 81 of the Companies (Consolidation) Act, 1908, does not entitle a person who has taken shares on the faith of the prospectus to rectification of the register. The difference in the wording of that section and s. 38 of the Companies Act, 1867, has not, in this respect, altered the law.

This was a motion by a Colonel Grey to rectify the register of the company by striking out his name as the holder of 200 preferred ordinary shares which he had applied for on the faith of a prospectus issued by the company on November 9, 1909. He alleged that the prospectus contained misrepresentations as to the preference in receipt of dividends which the preferred ordinary shares were to have over the deferred ordinary shares, by which he was misled; and also that the prospectus did not state certain facts required to be stated by s. 81 of the Companies (Consolidation) Act, 1908. The company had on two previous occasions in the year 1909 issued a prospectus offering shares to the public, and on each occasion the number of shares subscribed for was less than that offered, and on October 16, 1909, the company had mortgaged part of their property for 1600*l.* The prospectus of November 9 contained no mention of either previous issue of shares or of the mortgage. It was contended that these omissions gave the applicant a right to rectification. On the question of misrepresentation the judge held that the prospectus was misleading and the applicant was entitled to have his name removed from the register, but the decision turned on the construction of the particular prospectus and does not require a report. Upon the second point the material parts of s. 81 of the Companies (Consolidation) Act, 1908, are: "81.—(1.) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must

state . . . . (*d*) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount, if any, paid on the shares so allotted, ... (*k*) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected. . . . ."

Peterson, K.C., and *J. G. Wood*, for the motion. It was held under the Companies Act, 1867, s. 38, that an omission to specify in a prospectus the contracts required to be specified by that section did not give a person subscribing upon the faith of the prospectus a right to rectification. But that was decided solely on the ground that that section declared that any prospectus not specifying the same should be held to be fraudulent on the part of the promoters, directors, and officers of the company: *Gover's Case*. (1) In the Consolidation Act those words are purposely omitted. It imposes a plain statutory duty on the company. By directing the facts as to previous issues to be stated the Legislature must be deemed to have decided that they are material and such as would influence intending subscribers. The House of Lords in *Central Ry. Co. of Venezuela* v. *Kisch* (2) laid down the general principle that the public ought to be told all that the promoters know.

[NEVILLE J. referred to *Arnison* v. *Smith*. (3)]

In this case the concealment of the 1600*l*. mortgage amounted to a representation that no such mortgage existed.

Jenkins, K.C., and *E. H. Coumbe*, for the company, were not called upon on this point.

NEVILLE J., after deciding that the appellant was entitled to rectification on the ground that he was misled by the actual statements in the prospectus, proceeded:—A further point was raised on the failure of the company to comply with s. 81 of the

(1) (1875) 1 Ch. D. 182. (2) (1867) L. R. 2 H. L. 99.
(3) (1889) 41 Ch. D. 348.

NEVILLE J. 1910 WIMBLEDON OLYMPIA, LIMITED, *In re.*

Companies (Consolidation) Act, 1908. The applicant pointed out certain breaches of the statutory regulations imposed by that section, by omissions from the prospectus of things required by that section to be stated. He contended that on the ground of those omissions alone he was entitled to have the register rectified. I think that is not so. The section does not in terms so provide, and I cannot attribute to the Legislature the intention that the mere fact of the omission of any of the facts required by this section to be stated should give the shareholders this right to get rid of their shares. Of course there may be omissions of such a character that they would on other grounds entitle the shareholders to this relief, but in this case we have only the bare fact of omission. If this were the only ground for the application it would have to be dismissed.

Solicitors: *Tarry, Sherlock & King; C. P. Pritchard & Co.*

J. R. B.

C. A. 1910 *March* 9, 10.

STUBBS *v.* SLATER.

[1907 S. 4345.]

Stock Exchange—Broker and Client—Purchase of Shares—Carry over—Commission—"Net" Charge including Broker's Remuneration and Contango—Non-disclosure to Client—Secret Profit—Mortgage of Shares—Blank Transfer—Implied Power of Sale—Wrongful Conversion.

In November, 1904, the plaintiff instructed brokers on the London Stock Exchange to buy certain mining shares for him, it being understood that the shares were not to be taken up on the settling day, but were to be carried over. No agreement was made as to the remuneration of the brokers for arranging the carry over. The brokers bought the shares from a jobber, and in the bought notes sent by them to the plaintiff they charged an opening commission of 1*s.* per share. They arranged the carry over with the jobber, and the first continuation account sent by them to the plaintiff contained a charge of "8½*d.* net." The shares were carried over in this way every fortnight until January, 1906, the "net" rate varying with the market price of the shares. The plaintiff having failed to pay the balance against him on the mid October, 1905, carry over, they pressed for payment, and the plaintiff deposited with them as security a certificate for 390 gas shares, and signed a blank transfer of the same. The fortnightly balances continued adverse to the plaintiff and were not paid by him, and, after repeated applications to the plaintiff for payment, the brokers, in

January, 1906, closed the account with a balance of 69*l.* 10*s.* against him, and sold the 390 shares for 162*l.* 10*s.*

Throughout the above transactions the plaintiff thought that the "net" rate charged for every carry over represented only the jobber's contango; but it included also, in fact, a charge by the brokers for arranging the carry over which they did not disclose to the plaintiff. It appeared that the "net" rate was well known on the Stock Exchange to indicate that with the jobber's contango was included the broker's remuneration, and that the charge of the brokers, which amounted in the aggregate to 17*l.* odd, was reasonable.

The plaintiff brought an action against the brokers for an account and payment of the secret profit made by them in carrying over the mining shares and for damages for wrongful conversion of the gas shares. The defendants counter-claimed for payment of reasonable remuneration for carrying over the mining shares:—

Held, first (reversing Neville J.), that the defendants, not having been guilty of any breach of duty as agents, were entitled to retain the 17*l.* as reasonable remuneration; secondly (affirming Neville J.), that in the circumstances the implied power of sale was reasonably exercised.

Per Cozens-Hardy M.R. and Buckley L.J.: In the case of a mortgage of shares by deposit of the share certificate together with a blank transfer the fact that the mortgagee in giving notice requiring payment makes a mistake as to the amount due on the mortgage and demands too much is not a ground for invalidating the exercise of his implied power of sale.

And *semble* the same principle applies to the case of a pledge.

Pigot v. *Cubley*, (1864) 15 C. B. (N.S.) 701, explained.

APPEAL from a decision of Neville J. (1)

The defendants were a firm of brokers on the London Stock Exchange carrying on business under the style of Slater & Bond. The plaintiff was a metal merchant at Liverpool; he had some experience in Stock Exchange transactions. In November, 1904, he instructed the defendants to purchase on his behalf fifty Gold Fields ordinary shares and fifty East Rand proprietary shares for the next settling day, December 15. It was understood, however, that the shares were not to be taken up, but were to be carried over. The defendants accordingly bought the shares from a jobber on the Stock Exchange, and the bought notes sent by the defendants to the plaintiff were in common form, and therein the defendants charged the plaintiff a commission of 1*s.* per share, which was a usual charge to make in opening such an account. On December 13, 1904, the

(1) Ante, p. 195.

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defendants sent the plaintiff a contract note of the continuation account which they had arranged, and which, omitting formal parts, was as follows:

"Dear Sir,—We beg to advise continuation on your account of the under-mentioned stocks, subject to the rules of the London Stock Exchange.

Bought for Settlement 30th inst. Sold for 15th inst.

		Price.	Amount.			Price.	Amount.		
			£	s.	d.		£	s.	d.
50	East Rand . .	$9\frac{1}{16}$ $8\frac{1}{2}d.$ net	454	17	11	$9\frac{1}{16}$	453	2	6
50	Gold Fields .	$8\frac{1}{16}$ $8d.$,,	404	15	10	$8\frac{1}{16}$	403	2	6
		Duty . .		4					,,

The item "$8\frac{1}{2}d.$ net" in the above account meant the contango, i.e., the jobber's charge for carrying over the shares, plus a small charge by the brokers (the defendants) for arranging the carry over, but the plaintiff was not aware of this and thought that the "$8\frac{1}{2}d.$ net" was only the contango. The shares were carried over in this way every settling day, the "net" rate varying with the market price of the shares, until January, 1906, when the account was closed as after stated.

The balances on the fortnightly accounts were generally against the plaintiff, and he paid them until the mid October, 1905, account, which shewed a balance of 43*l.* 10*s.* due from him, which he failed to pay. The defendants pressed for payment, and he thereupon deposited with them as security a certificate for 390 shares of the Incandescent Heat Syndicate, Limited, and at the same time signed and handed to them a blank transfer of the shares and promised but again failed to pay the account. The fortnightly accounts continued adverse to the plaintiff during November and December, 1905, and the beginning of January, 1906, and the balances due from him remained unpaid. On November 30, 1905, the defendants by Mr. King, one of their clerks, had written the plaintiff as follows:

"As we have not received your promised cheque for balance of account due I regret I must close the shares open and also dispose of the Incandescent Heat Syndicate shares (which you have

left here as security) for what they will fetch to meet the debit balance";
and they wrote him letters to the same effect on December 14, 1905, and January 6 and 13, 1906.

On January 17, 1906, the defendants closed the continuation account with a balance of 69*l.* 10*s.* against the plaintiff. They sold the mining shares for the next settling day, January 25, and this sale resulted in a small profit. They also sold the 390 shares in the Incandescent Heat Syndicate to a Mr. Boyd for 162*l.* 10*s.* Shortly before this date they had had an offer from Boyd for the purchase of 300 of these shares, they being under the impression that the certificate was for that number, but upon discovery of the mistake Boyd agreed to purchase the lot. On the same January 17 they telephoned to the plaintiff that they had closed his account and sold the 390 shares. The plaintiff repudiated the sale and brought this action against the defendants. By his statement of claim the plaintiff alleged that the defendants had wrongfully converted the shares in the Incandescent Heat Syndicate to their own use and had wrongfully made secret profits in respect of the carrying over transactions, and he claimed an account of such secret profits and damages for the wrongful conversion. The defendants denied the allegations in the statement of claim and put in a counterclaim whereby they alleged that by the custom of the Stock Exchange they were entitled to receive half commissions for carrying over the mining shares, amounting in the aggregate to 59*l.* odd, and alternatively that they were entitled to reasonable remuneration, which they alleged considerably exceeded the 17*l.* odd which they actually received; but at the bar they limited their claim to the 17*l.* odd.

Neville J. held, first, that the defendants were bound to account for the secret charges they had made and were not entitled to any remuneration for carrying over the mining shares; secondly, that they had exercised the implied power of sale which they had over the shares in the Incandescent Heat Syndicate reasonably and that the plaintiff was not entitled to any relief on that head.

The plaintiff appealed from the second part of this judgment,

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and there was a cross-appeal by the defendants against the first part.

Butcher, K.C., and *E. Lunge*, for the plaintiff on the first appeal. There was no special bargain between the parties as to sale, and no memorandum of deposit. The question is merely one of law: What right did the defendants acquire by the deposit of a blank transfer? *Deverges* v. *Sandeman, Clark & Co.* (1) shews that they had a power of sale, but it also shews that the power can only be exercised when a reasonable time has elapsed after notice requiring payment. The defendants did not exercise their legal rights. They never gave us a proper notice. They closed the account in the mining shares and sold the deposited shares on the same day. They had previously required the plaintiff to pay the sum due while the account was open, but the closing of the account might either balance it exactly or increase or diminish the amount due. They ought to have closed the account and then given the plaintiff reasonable notice to pay the sum due before they sold. This sale is bad because the notice demands too much: *Pigot* v. *Cubley*. (2)

[COZENS-HARDY M.R. referred to *Tucker* v. *Wilson*. (3)]

The sale was also bad because the defendants sold the whole block of shares deposited. They could have divided them and ought only to have sold sufficient to pay what was due.

Jenkins, K.C., and *J. F. W. Galbraith*, for the defendants. *Deverges* v. *Sandeman, Clark & Co.* (1) was a case of a loan. Here there was no loan, but an obligation on the plaintiff to put his agents in funds. *Pigot* v. *Cubley* (2) was the case of a pledge. *Harrold* v. *Plenty* (4) shews that where there is a deposit of shares with a blank transfer the transaction is a mortgage. There is no rule that a mortgagee should state the amount due to him as an essential to the validity of his exercising his power of sale. It would be a great extension of the doctrine laid down in *Pigot* v. *Cubley* (2) as to pledges to apply it to a mortgage of shares.

[They were stopped by the Court on the plaintiff's appeal.]

(1) [1902] 1 Ch. 579.
(2) 15 C. B. (N.S.) 701.
(3) (1714) 1 P. Wms. 261.
(4) [1901] 2 Ch. 314.

On the cross-appeal. As there is no allegation of fraud or breach of duty against the defendants they were entitled to a proper remuneration for carrying out their duties. It is admitted that the amount received was less than they were reasonably entitled to, and it does not matter in what way they charged it. *Hippisley* v. *Knee Brothers* (1) covers this case. *Andrews* v. *Ramsay & Co.* (2), on which Neville J. relied, was a case of fraud. The word "net" may not have been very happily chosen, but it must have shewn the plaintiff that the transaction was special, and he could not expect the defendants to work for nothing.

Butcher, K.C., and *E. Lunge*, on the cross-appeal. The judge has found as a fact that the defendants received a secret remuneration which the plaintiff knew nothing about. But if a broker wishes to charge a commission he must do so eo nomine, or if he wishes to wrap it up with the amount of the contango he must give some notice to the client that the charge includes his remuneration, e.g., by a note in the account to that effect. If the loose practice of the Stock Exchange is affirmed the result will be that the client will not know what is being done on his behalf or for what he is being charged: *Johnson* v. *Kearley*. (3) There was not sufficient on the face of these accounts to put the principal upon inquiry, and it is not the duty of the principal in such a case to make inquiry; it is the duty of the agent to make full disclosure to the principal. The principle of *Dunne* v. *English* (4) applies to this case. It is said that assuming that the defendants are liable for the 17*l.* they are entitled to reasonable remuneration for their services; but if an agent in breach of his duty makes a claim for remuneration which turns out to be unsustainable by reason of its being a secret profit he cannot claim remuneration on a different footing: *Andrews* v. *Ramsay & Co.* (2)

[COZENS-HARDY M.R. That was a case of fraud.]

Moral turpitude is not necessary to deprive an agent of his remuneration; breach of obligation is sufficient: per Kennedy J. in *Hippisley* v. *Knee Brothers*. (5)

(1) [1905] 1 K. B. 1.
(2) [1903] 2 K. B. 635.
(3) [1908] 2 K. B. 514.
(4) (1874) L. R. 18 Eq. 524.
(5) [1905] 1 K. B. 9.

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COZENS-HARDY M.R. There are two appeals here, an appeal by the plaintiff against a refusal by the learned judge on one point, and a cross-appeal by the defendants against that part of the judgment which was in favour of the plaintiff. They are quite distinct, and I think it will be convenient to take them in the order in which they have been argued before us. The plaintiff claims damages for the wrongful conversion of certain shares deposited by him with the defendants by way of security or cover for certain Stock Exchange transactions. The plaintiff was minded to gamble on the Stock Exchange and he fell in with a firm of stockbrokers who were willing to assist him He instructed the brokers to buy on his behalf 100 mining shares, it being understood by both parties that this was a purely gambling transaction and that the shares were to be carried over. The shares were carried over every fortnight and continuation notes were regularly delivered by the defendants to the plaintiff. The result was that in some few cases in the earlier part of the period there was a small sum due from the defendants to the plaintiff, which sum was paid, but in all the later transactions there was a balance regularly due from the plaintiff to the defendants. The defendants never undertook to finance the plaintiff or to lend him any money. They required and obtained from him by way of security, or cover, as it is technically called, 390 shares in the Incandescent Heat Syndicate, Limited. These were deposited in October, 1905. The fortnightly accounts, as I have said, continued to shew a balance in favour of the brokers and against the client. The brokers shewed what I can only describe as extreme indulgence towards the plaintiff. At the end of 1905 and the beginning of 1906 they wrote to him repeatedly, saying, "Pay us what you owe us. If you do not we shall have to close our account and realize our security." The plaintiff made excuses from time to time; he did not pay any part of the balance, which at the end of the period amounted to 69*l.* odd, and on January 17, 1906, the defendants sold the shares which were the cover furnished by the plaintiff. If one asks how they were entitled to sell it is necessary to go back a step. The plaintiff handed over to the brokers one certificate for the 390 shares together with a transfer executed by the plaintiff in

blank, in which the numbers of the shares were specified, but the name of the purchaser and the consideration were, of course, not specified. It was the ordinary well-known transfer in blank. Now what is the effect of that? I am astonished that there should be any doubt about it. So long ago as 1899 Stirling J. in *London and Midland Bank* v. *Mitchell* (1) dealt with a case of precisely this nature and indicated what was the legal effect of it. That was a case in which certain shares together with a blank transfer had been deposited with a bank to secure a debt, and it was held that the bank had not lost their right against the shares although their simple contract remedy against the client was lost by reason of the Statute of Limitations. The Court there pointed out that the whole transaction was a mortgage as to which the bank were entitled to the ordinary remedy of foreclosure. Precisely the same point came before me in 1901 in *Harrold* v. *Plenty* (2), where I pointed out the distinction between the position of a mortgagee and a pledgee. I refer to my judgment in that case, not as laying down any new law, but as stating what is perfectly well known law. I there said: "Now, it is plain that a pledgee is in a very different position from an ordinary mortgagee. He has only a special property in the thing pledged. He may obtain a sale, but he cannot obtain a foreclosure. I do not think that this is properly a case of pledge. A share is a chose in action." This then was a transaction of mortgage and not a transaction of pledge. It was a transaction of mortgage, in which there was no express power of sale given, but which by law involves and implies a right in the mortgagee to sell after giving reasonable notice. I need scarcely pause to say that the notice here was reasonable, if ever there was reasonable notice. Then the matter came before the Court of Appeal in 1902 in *Deverges* v. *Sandeman, Clark & Co.* (3) There it was laid down that in the case of a mortgage by deposit of shares there is an implied power to sell, if no time is fixed, upon giving reasonable notice, and the only point decided in that case was whether or not the notice was reasonable. Nothing else was there decided except that the general principle applicable to

(1) [1899] 2 Ch. 161. (2) [1901] 2 Ch. 314, 316.
(3) [1902] 1 Ch. 579, 597.

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transactions of this kind was for the first time laid down by the Court of Appeal. In the course of my judgment, which I refer to only because I see no reason to change the view which I there expressed, I say this: "Although a mistake as to the amount due may destroy the effect of the notice, as between pledgor and pledgee—*Pigot* v. *Cubley* (1)—I think that is not the law as between mortgagor and mortgagee. In order to restrain a mortgagee from selling, in the absence of fraud, it is not sufficient to contest the amount due on the mortgage. The mortgagor must pay into Court, or tender to the mortgagee, the amount claimed to be due." I there referred to *Pigot* v. *Cubley* (1), saying that a mistake as to the amount due might destroy the effect of the notice as between pledgor and pledgee. I have looked at that case again and as at present advised I can find nothing in the judgment in the Court which bears out the last sentence in the head-note, which says that "a notice that he"—i.e., the pledgee—"will sell unless an excessive sum be paid immediately, is not such a notice as will justify the sale." But, however that may be, it seems to me that in a mortgage as distinguished from a pledge that head-note affords no ground for the contention that a mortgagee has not a power of sale after giving reasonable notice unless the notice specifies with precise accuracy the amount due on the mortgage. I see no ground for making any exception from the general law in this particular class of mortgage. There was here alleged to be due on the mortgage the sum of 69*l.* odd. That being so, and there having been abundant applications for payment, I am clearly of opinion that the mortgagees had a perfect right to sell these shares. No question arose as to the price at which the shares were sold. The shares were not shares of which there was any market price. The transfer was a transfer naming the whole 390 shares, and it seems to me impossible to impute any blame to the defendants for doing that which the plaintiff himself by the form of the transfer had authorized them to do—sell the whole block of shares. But then it is said by the plaintiff, "You, the brokers, had an offer for a smaller lot which would have been sufficient to pay your

(1) 15 C.B. (N.S.) 701.

debt." The answer is that they could not have given a direct title to a purchaser to a portion of the 390 shares because the blank transfer was for the whole 390. I therefore see no ground for saying that the sale was otherwise than authorized and proper. I think that the view taken by Neville J. was perfectly right and that this appeal must be dismissed.

I have purposely thus far not alluded to an argument on which great stress was laid by the plaintiff's counsel but which I am unable to apprehend. It was contended that the brokers were not entitled to exercise the power of sale and close the account on one and the same day. Why not? The 69*l.* odd was a debt presently due and payable. It was due and payable altogether irrespective of what might have been the result, if the defendants had again carried over the shares, of the realization of the shares. There were two positions. The plaintiff owed the defendants 69*l.* odd, a debt for which they had security. Further, the plaintiff, being an impecunious person in the sense of not having the money available for payment, was bound to indemnify the defendants and put them in funds to complete the purchase although it was never intended that he should complete. It was always intended that the brokers should have the right to close the account and to enter into a contract with somebody else to buy, and that is what they eventually did, with the result that there was some small profit on this last occasion. The plaintiff may, of course, have an account against the mortgagees of the proceeds of sale, but he is not content with that.

The other part of the case raises an entirely different point. The plaintiff says "I employed you as brokers; I do not go so far as to say I thought you were going to carry over the shares for me for thirteen months for nothing, but I say that you are not entitled to anything more than the commission of 1*s.* per share which you got on the opening transaction." That may be right, but, to say the least, it is startling. We are not dealing here with any case of fraud or misconduct. So far as I can see the brokers have acted with perfect honesty and propriety. What they did was this. I take the first of the continuation notes, which are all in the same

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form. It says "We beg to advise continuation on your account of the undermentioned stocks, subject to the rules of the London Stock Exchange." Then it states that the shares were bought for such and such a day and sold for such and such another day, and it gives the prices, and then there is this charge of "8½*d.* net." The plaintiff admits that his attention was called to this item. The evidence shews that the word "net" is really a technical term on the Stock Exchange. The plaintiff asked no question as to the meaning of the term. What then does it mean? I understand the word to mean that nothing more will be charged than this 8½*d.* net. The plaintiff was not a babe in arms in respect of Stock Exchange transactions. According to his own statement he had had on more than one occasion what he calls a flutter on the Stock Exchange, and he probably knew what contango meant; but he says he did not know the meaning of the term "net." I think the true view is that this sum "8½*d.* net" consists of two items, first, the contango charged by the jobber, and, secondly, the broker's remuneration. When once you arrive at the conclusion that in all reasonableness the brokers were to be remunerated for their services and that there was no express contract with the plaintiff as to their method of remuneration, I fail to see here any hidden or secret profit within the meaning of the cases. I think there was no breach of duty on the part of the defendants in claiming remuneration for their services in carrying over the shares. The idea that they were to carry over during all this period for nothing appears to me to be quite unreasonable, and, if it were necessary, I should be prepared to hold that by using this Stock Exchange term "net," which asserts that the broker's commission as well as the contango is included in the charge, the defendants were not in any sense claiming a secret commission, but were merely using language appropriate to the Stock Exchange in claiming this remuneration. But it is not necessary to proceed on that footing. Ex concessis the brokers were entitled to some commission. There was here no express agreement as to the amount of the commission. What then? It follows that they are entitled to a quantum meruit. The plaintiff does not allege that the amount charged is otherwise than

proper as a quantum meruit, and as a matter of fact the amount charged is much less than the half commission which is usually charged in these transactions, and which the plaintiff admitted he had paid on former occasions. There is therefore no ground whatever for saying that the plaintiff is entitled to an order against the defendants for repayment of this 17*l.* odd, the amount charged for their commission. I cannot help thinking that Neville J. has been unduly impressed by an entirely different class of cases—cases in which there was such a breach by the agent of his duty as agent that the matter might be properly regarded as a fraudulent transaction. But here the defendants have acted throughout with perfect propriety. The result is that the plaintiff's appeal must be dismissed with costs and the defendants' appeal allowed with costs, and that the action must be dismissed with costs, the defendants to have the costs of the counter-claim. But the plaintiff is entitled to an account of the proceeds of the sale of the 390 shares, if he so desires, at his own risk as to costs.

BUCKLEY L.J. It is logically convenient to deal first with the cross-appeal of the defendants, the stockbrokers. The learned judge has given judgment against them for 17*l.* odd, that being the difference between the amount which they charged the plaintiff in the continuation notes and the amount which they actually paid to the jobber. The question is whether that is right. The accounts which the defendants rendered to the plaintiff have charged him every fortnight a certain sum (say) "$8\frac{1}{2}d.$ net." That was a sum which exceeded the amount they were paying to the jobber and was a sum charged to cover both the payment made to the jobber and the services of the brokers in carrying over the shares. I understand the word "net" to mean "neat" or exact. If you speak of "net" profits you mean the profits remaining after making all proper deductions. If a tradesman sends in his account and charges so much "net" he means "I am not going to allow you any discount off this; I am not going to charge you any less sum." According to the language of the Stock Exchange it seems that the word "net" is used to mean "I am not going to charge you any more than

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this: this is the total amount of my charge." By a layman that might be more properly expressed by the word "inclusive," but upon the evidence I have no doubt that in the mouth of the defendants this was a perfectly intelligible expression and that it had the meaning I have stated. It does not follow that the plaintiff so understood it. He says he did not, and the learned judge has so found. Be it so. The facts then were these. The plaintiff was being charged a sum in an account which did not shew any charge at all for the brokers' services. The judge having found that the brokers were not charging anything further for their services and that they were acting quite honestly, what is the outcome? The outcome is not that they were not entitled to charge the plaintiff more than they were paying the jobber for carrying over, but that they were entitled to proper remuneration. The brokers have delivered a counter-claim, and in their counter-claim they claimed half commission. The plaintiff admitted in his evidence that he had been charged half commission in previous Stock Exchange transactions. At the bar, however, the brokers did not ask for so much. They said that the 17*l.* odd was sufficient, and the plaintiff said he was not prepared to dispute that that was a proper and reasonable remuneration, if any commission was payable. It follows that the account must be reduced by deducting the 17*l.* odd and must be increased by adding the brokers' proper remuneration with the same result as before except that there may be a question whether the brokers are not entitled to a larger amount. There is nothing for which the defendants are responsible to the plaintiff. I think, therefore, that this appeal succeeds and must be allowed with costs.

Then I come to the plaintiff's appeal, in which he claims damages for the wrongful conversion of certain shares in an incandescent heating company. He mortgaged these shares to the defendants; he contends that they improperly sold them. He says, first, "You were wrong in selling at all." Secondly he says, "If you were entitled to sell the shares at all, you sold too many." His contention on the point that the brokers ought not to have sold at all is rested on this. He says "You demanded too large a sum as the amount due to you on the mortgage, and,

because you demanded too much, your sale was erroneous." My first answer to that is that the amount demanded was not too much and therefore the question does not arise. But, as the point has been argued, I wish to say something on this part of the case. If a mortgagee is going to exercise his power of sale he may say to the mortgagor "Pay me what you owe me; if not I will sell." It is not for him to name the amount due. If the mortgagor asks what the amount is and the mortgagee states it, the mortgagor must come with that amount, otherwise the mortgagee may sell. There have been many cases in which an interlocutory order has been asked to restrain a mortgagee from acting on his power of sale; the price of the relief is that the amount which the mortgagee says is due to him must be produced. Suppose a mistake has been made as to the amount, the power of sale is none the less exercisable. It is said that the contrary has been laid down in *Pigot* v. *Cubley* (1) in the case of a pledge. The last sentence of the head-note goes to it, but I cannot find that it is supported by anything in the judgment of the Court. *Pigot* v. *Cubley* (1) was an action for the wrongful conversion of two pictures. The pictures were deposited with the defendant as security for a loan of 5*l.* for which the plaintiff gave the defendant a promissory note at a month. The note not having been paid at maturity, it was arranged between the parties that the time for payment should be extended. There was a dispute as to the effect of this arrangement, and the question was left to the jury whether the arrangement was, as the plaintiff alleged, that, if he paid 10*s.* a month, he should have an indefinite extension of the time for payment, or whether it was that he was to pay 10*s.* for one month only, and, if he did not pay, the debt was to become due. In September, 1862, more than a month after the promissory note had matured, the defendant wrote to the plaintiff that unless the amount of his claim, which he stated, was settled he should dispose of the pictures. The money was not paid and the pictures were sold. The defendant had in fact demanded 1*l.* more than was due. The plaintiff contended that, the time for repayment being indefinite, and the defendant having claimed more than he was

(1) 15 C. B. (N.S.) 701.

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entitled to, the sale was a wrongful act. The jury found that the plaintiff's version of the arrangement for the extension of the time was the true one that an indefinite extension of the time for payment was granted, and they assessed the value of the pictures at 20*l*. The judge held that there was an implied power to sell and directed judgment to be entered for the defendant. The plaintiff then moved that judgment might be entered for him for 20*l*. Erle C.J., in delivering the judgment of the Court, dealt with two points. The first was whether there was a power of sale at all, there being no express power of sale. Upon that he says, after stating facts (1): "On these facts, the question arose, whether such sale was unauthorized, inasmuch as the jury found that it was not expressly made part of the original agreement, that the defendant should have a power to sell in default of due payment of the note. The judge at the trial thought that the defendant had nevertheless authority to sell, inasmuch as the deposit was made as a security for the payment of the debt on a future day certain. And the verdict was accordingly entered for the defendant. We think that the judge was right as to this point." That was an affirmance of the proposition that a charge such as this, without an express power of sale, carried with it an implied power of sale. Then the Chief Justice deals with the second point and says that after all it was unnecessary to determine whether there was an implied power of sale because "the parties had substituted a new agreement, under which the time for payment, and consequently the power of sale, was indefinitely extended." That is to say that the circumstances had not arisen upon which the power of sale became operative. Then comes the sentence upon which the last paragraph of the head-note is based: "And, on this latter point, our opinion is in favour of the plaintiff; for, although it was certainly competent to either party, by taking proper steps, to terminate the new arrangement"—that is the arrangement for an indefinite extension of the time for payment—"yet we think the mere sending of the letter demanding an excessive amount had not that effect." That is to say, the demand did not put an end to the

(1) 15 C. B. (N.S.) 709.

arrangement by which the power of sale was suspended. *Pigot* v. *Cubley* (1) decides nothing as to what would have been the result if the power of sale had not been suspended.

In my opinion the sale of the shares by the brokers was not wrongful, and this on two grounds: first, because they did not demand more than was due, and, secondly, because if they did, that was not a ground upon which their exercise of the power of sale could be questioned. That leaves a third point. It is said that the brokers sold too many shares. I confess that is a contention which surprises me. The plaintiff had given the brokers a transfer of 390 shares together with one share certificate for 390 shares. The transfer was signed by the transferor in blank. The brokers were therefore in possession of an instrument which enabled them to sell and complete the sale of 390 shares, and no less. It is said that they ought to have sold only 300 out of the 390, that they should first have filled in their own names as transferees of the 390 and then have sold 300. Suppose the shares had been partly paid shares. Were the mortgagees bound to put the shares into their own names? Certainly not. The position was that the mortgagees were to be entitled to sell the 390 shares and out of the proceeds to pay themselves the amount due for principal, interest, and costs and to pay the plaintiff the balance. I agree that this appeal should be dismissed.

JOYCE J. I am of the same opinion. As to that part of the judgment with respect to which the plaintiff has appealed I see no reason to differ from the conclusions of the learned judge below or from the reasons which he gave for those conclusions, and I desire respectfully to express my concurrence with the decision of the Master of the Rolls in *Harrold* v. *Plenty*. (2) Then upon the appeal by the defendants as to the charge of $8\frac{1}{2}d.$ net, it must be observed that the present is not a case of any fraud or dishonesty on the part of the brokers. In my opinion this is not a case which can be properly treated as that of an agent seeking to make a secret profit against his principal or anything of that kind. People conversant with the Stock Exchange would know that the charge of $8\frac{1}{2}d.$ net would include

(1) 15 C. B. (N.S.) 701. (2) [1901] 2 Ch. 314.

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a small commission to the brokers although the amount is not stated. The plaintiff was not a novice in these matters. He was a gambler on the Stock Exchange, and I think that he could not have expected the brokers to act without remuneration in carrying over twenty-five or twenty-six fortnightly accounts. I can see no reason why the brokers, if not entitled to retain this sum of 17*l.* as such, should not be allowed a reasonable commission for their services, and it is not suggested that this sum is not reasonable. In my opinion the cases in which an agent has been deprived of commission by reason of his breach of duty as agent have no bearing at all on this case. I therefore agree that the defendants' appeal must be allowed.

Solicitors: *Weekes & Co.; H. S. Holt.*

H. B. H.

C. A. 1909 EVE J. *March* 3, 4, 5, 9, 10, 11, 12, 16, 17, 18, 22, 23. 1910 C. A. *Jan.* 14, 15, 17, 18, 19; *March* 19.

DEELEY *v.* LLOYDS BANK.

[1905 D. 658.]

Mortgage—Bank—Mortgage to secure Current Account—Subsequent Mortgage—Appropriation of Payments—Rule in Clayton's Case.

The rule in *Clayton's Case*, that payments carried by a creditor to a current account which is communicated to the debtor are to be appropriated to liabilities in order of date, is founded on a presumption of the creditor's intention and will not be applied in a case where it is proved by the conduct of the parties that the creditor had no such intention.

In September, 1893, G. mortgaged property to a bank to secure an overdraft on his current account limited to 2500*l.* The bank held other security for the overdraft to the amount of 1000*l.* In 1895 G. mortgaged the same property to D. to secure 3500*l.* This mortgage recited the mortgage to the bank and was expressly made subject to it. Notice was given to the bank, but they continued the current account with G. instead of opening a fresh account. G. from time to time made payments to his account which, if applied according to the rule in *Clayton's Case*, would have paid off the moneys due at the date of the second mortgage by January 6, 1896. The bank never allowed G. to overdraw beyond the limit of 3500*l.* for which they held security, except temporarily on deposit of fresh security. G. also often appropriated payments in to meet particular cheques. D., through her husband, who was her agent and acted as solicitor for G., had full notice of all the dealings between G. and the bank. G. was made bankrupt in 1899, and the

bank in that year realized their security for a price just sufficient to pay them the amount due. D. did not at that time complain, and her husband procured from the bank a release of a guarantee of their mortgage given by T. G., and thereupon D. got a release of a counter-guarantee given by her to T. G.

In April, 1905, D. commenced this action for an account against the bank on the footing that they were not entitled to charge for advances made to G. after notice of the mortgage to D. :—

Held by Fletcher Moulton and Buckley L.JJ. (dissentiente Cozens-Hardy M.R.), that there was sufficient evidence to shew that the bank had not intended to appropriate the payments in discharge of the debts secured by the mortgage and that the rule in *Clayton's Case* did not apply.

Decision of Eve J. affirmed.

Clayton's Case, (1816) 1 Mer. 572, and *Hopkinson* v. *Rolt*, (1861) 9 H. L. C. 514, discussed.

On September 21, 1893, John Glaze, who was carrying on business as an ironfounder, executed a mortgage of certain property known as the Brookmore property, which included his works, to Lloyds Bank Limited to secure his overdraft on current account. The mortgage contained a covenant by John Glaze that he would pay on demand, or if no demand should be made in his lifetime then his heirs, executors, or administrators would pay on his death, to the bank "the balance then owing from the mortgagor on his current account with the bank for cheques notes or bills drawn accepted or indorsed by him or for advances made to him or for his accommodation or benefit or otherwise howsoever including interest with half-yearly rests commission and other customary charges and will also pay interest on such balance from the date of such demand or death as the case may be at the rate of 5 per cent. per annum." Then followed a conveyance of the property subject to a proviso for redemption "if all moneys hereinbefore covenanted to be paid shall be duly paid accordingly." The deed also contained a proviso that the amount to be secured thereby should not exceed 2500*l.* It was made subject to a first mortgage for 2500*l.* which was afterwards transferred to the bank. The bank held other security for John Glaze's overdraft to the amount of 1000*l.*

By a third mortgage dated October 19, 1895, but not in fact executed until December 2, 1895, John Glaze mortgaged the same property, together with other property, to his sister, the

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wife of Frank Deeley, to secure 3500*l.* expressed to be advanced by her. This deed contained a recital of the mortgage to the bank, omitting the limit of the amount thereby secured, and stated that there was then due to the bank on their security 3586*l.* It was expressly made subject to the first and second mortgages. There was a conflict of evidence whether and at what date notice of Mrs. Deeley's mortgage was given to the bank, but Eve J. had found as a fact that notice was given on December 2, 1895. He had also found as a fact that the mortgage to Mrs. Deeley was made for good consideration.

The bank did not follow the usual practice of drawing a line at the date when they received notice of Mrs. Deeley's mortgage, so as to close John Glaze's account and start a fresh one, but continued his current account without any break. The overdraft was never materially reduced. But John Glaze from time to time made payments to his account, and if these payments had been applied in discharge of the payments out by the bank, in order of date according to the rule in *Clayton's Case* (1), the debt secured by the bank's mortgage would have been discharged on January 6, 1896. The bank never after the date of their mortgage allowed the overdraft to exceed the limit of 3500*l.* for which they held security, unless John Glaze deposited fresh security for a temporary advance. The plaintiff's mortgage was itself temporarily deposited with the bank for this purpose very soon after its execution, and on at least one occasion afterwards. On many occasions John Glaze paid in moneys which he appropriated to meet special cheques or payments out, but no notice of any such appropriations appeared in the account.

Early in 1899 John Glaze had become insolvent, and on March 23, 1899, the bank, having taken a transfer of the first mortgage, entered into possession of the property comprised in the mortgages, and on May 24 they sold it for 5500*l.*, which was just sufficient to pay what was due on the two mortgages and leave a balance of 37*l.* No complaint was made of this sale at the time, and the plaintiff's husband obtained from the bank a release of a guarantee given to them by Thomas Glaze, a brother of John Glaze, for the moneys secured by the mortgage, on the

(1) 1 Mer. 572, 585.

ground that the bank had been paid, out of the moneys received from the mortgage, and obtained from Thomas Glaze a release of a counter-guarantee given to him by Mrs. Deeley. It was proved that Frank Deeley had acted as solicitor and agent for John Glaze in all his transactions with the bank, and had also acted as attorney and general agent for his wife in all money transactions, and that she had through him notice of all the dealings between John Glaze and the bank. The correspondence was considered by Eve J. and Fletcher Moulton and Buckley L.JJ. to shew that these dealings, and a number of applications by Glaze or Deeley on his behalf for temporary overdrafts, were carried on and made on the understanding that an overdraft was allowed to a certain amount if 2500*l.* were secured.

This action was commenced by Mrs. Deeley on April 29, 1905, against the bank claiming accounts as against a mortgagee in possession, on the footing of a declaration that the bank were not entitled to charge for advances made by them to the said John Glaze after they had notice of the plaintiff's mortgage.

She also claimed damages for the sale of the mortgaged premises as having been made at a gross undervalue and otherwise improperly.

The case came on before Eve J. on March 3, 1909, and occupied twelve days in hearing.

P. O. Lawrence, K.C., Buckmaster, K.C., and *W. R. Sheldon*, for the plaintiff.

Astbury, K.C., Stewart-Smith, K.C., and *J. H. Stamp*, for the defendants.

EVE J., after carefully examining the evidence, stated his conclusion that the plaintiff had proved that notice of her mortgage was in fact given to the bank on December 2, 1895. He said that no one disputed that the legal result of the service of that notice was that as from that date the bank could not, as against the plaintiff, tack to their security any advances which they might subsequently make to Mr. John Glaze. But, unless the rule in *Clayton's Case* (1) was to be applied to the bank's account,

(1) 1 Mer. 572, 585.

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they did not need to tack any subsequent advances, for the amount due at the date of the mortgage to Mrs. Deeley had never been paid off. He examined the facts as to the account, and came to the conclusion that the rule in *Clayton's Case* (1) need not be applied for much the same reasons as are stated in the judgments of Fletcher Moulton and Buckley L.JJ.

He then decided on the evidence that the plaintiff had not proved any impropriety in the sale and dismissed the action.

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The plaintiff appealed, but the only question argued on the appeal was whether the mortgage to the bank had been discharged by the rule in *Clayton's Case.* (1) The appeal came on for hearing on January 14, 1910.

P. O. Lawrence, K.C., and *W. R. Sheldon*, for the plaintiff. This case falls within the rule in *Clayton's Case.* (1) That rule is that where a current account is kept by a creditor and communicated to the debtor in the absence of any specific appropriation by either party the payments are de facto appropriated according to the priority in order of the entries on the one side and on the other of that account: *In re Sherry.* (2) If the bank had desired to get rid of the application of that rule they should have drawn a line and broken the account on receiving notice of the plaintiff's mortgage. No doubt entries made by a creditor in his own books without communication to the debtor are not conclusive against the creditor, and until communication he continues to have the option of applying the several payments in any mode he thinks fit. But where a pass-book is kept for the common use of both parties, and that has been communicated to the customer, the bank is precluded from altering the account: *Simson* v. *Ingham* (3); *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (4); *Smith* v. *Betty.* (5) The application of this rule brings the case within the principle of *Hopkinson* v. *Rolt* (6), which decides that where there is a first mortgage to secure present and future advances the mortgagee cannot claim priority over a second mortgagee in respect of advances made

(1) 1 Mer. 572.
(2) (1884) 25 Ch. D. 692, 702.
(3) (1823) 2 B. & C. 65, 73.
(4) (1882) 22 Ch. D. 61, 71.
(5) [1903] 2 K. B. 317, 323.
(6) 9 H. L. C. 514.

after notice of the second mortgage. That principle was applied in *Bradford Banking Co.* v. *Briggs* (1) and *Union Bank of Scotland* v. *National Bank of Scotland.* (2) In *London and County Banking Co.* v. *Ratcliffe* (3) there was a combined application of the principles of *Clayton's Case* (4) and *Hopkinson* v. *Rolt* (5), and it was there held that the bank had lost their security. That exactly covers this case. This is an ordinary case of a current banking account communicated to the customer, and there is no evidence of any specific agreement to appropriate. It is distinguishable from all the cases in which the rule in *Clayton's Case* (4) has been held to be excluded: *Henniker* v. *Wigg* (6); *City Discount Co.* v. *McLean* (7); *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca."* (8)

Astbury, K.C., and *J. H. Stamp*, for the defendants. The rule in *Clayton's Case* (4) has nothing to do with this litigation at all. The form of the documents excludes the application of that rule altogether, that is to say, the form of the bank's mortgage, and the form in which it is recited in the Deeley mortgage. Further, the circumstances of the case and the conduct of the parties are such that not only is the principle of *Clayton's Case* (4) excluded, but also the principle of *Hopkinson* v. *Rolt.* (5) The circumstances under which the Deeley mortgage was made are vital to the question what was the intention of Mrs. Deeley and her husband with regard to the bank mortgage. To exclude the rule in *Clayton's Case* (4) it is only necessary to prove such a set of circumstances that no jury would find the appropriation presumed in that rule. *Clayton's Case* (4) says that only in the absence of evidence is that particular form of appropriation to be presumed. If there is any evidence at all to go to the jury as to what were the real intentions of the parties *Clayton's Case* (4) has no application. Here Glaze was being financed by Deeley; it was vital to Deeley to keep Glaze's business going, because that was the only mode of escaping bankruptcy, and in the particular circumstances of this mortgage

(1) (1886) 12 App. Cas. 29.
(2) (1886) 12 App. Cas. 53.
(3) (1881) 6 App. Cas. 722.
(4) 1 Mer. 572.
(5) 9 H. L. C. 514.
(6) (1843) 4 Q. B. 792.
(7) (1874) L. R. 9 C. P. 692.
(8) [1897] A. C. 286.

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Deeley was the alter ego of his wife, because she authorized and intended that he should so act for the purpose of assisting Glaze. The object was that Glaze should be able to give the Deeleys some security if and when he had paid off the bank. The intention of all the parties was that the bank should keep their security. The rule in *Clayton's Case* (1) is merely a rule of evidence of intention, and it has never been applied in modern days where there is any evidence at all of a contrary intention. It was applied in *London and County Banking Co.* v. *Ratcliffe* (2) because there was there no evidence of intention other than the books, and so far as appears the point was not contested. As to the conduct, there was an entire absence of the facts which exist in this case.

Hopkinson v. *Rolt* (3) has no application to a mortgage to secure a customer's current account. That case deals only with an agreement between a first and second mortgagee that if something is done in the future something else shall result, e.g., a further security shall be given; it therefore has no bearing on a floating charge. The fact that there is a floating charge with a limit makes all the difference. It is plain that the bank were not keeping the account, according to the book entries, with any intention that the earlier and secured part of the debt should be run off by subsequent payments in; it was always intended to keep the existing security on foot. The present case is precisely the same as *Henniker* v. *Wigg* (4) and *City Discount Co.* v. *McLean* (5), where the rule in *Clayton's Case* (1) was held to be excluded. Very slight circumstances are sufficient to exclude the rule: *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca."* (6)

P. O. Lawrence, K.C., in reply.

Cur. adv. vult.

March 19. COZENS-HARDY M.R. This appeal raises questions of much difficulty as to the rights of the bank, who have a mortgage to secure a current account, as against a mortgagee subsequent in date, who claims priority by reason of the application

(1) 1 Mer. 572.
(2) 6 App. Cas. 722.
(3) 9 H. L. C. 514.
(4) 4 Q. B. 792.
(5) L. R. 9 C. P. 692.
(6) [1897] A. C. 286, 295, 296.

of the rule in *Clayton's Case.* (1) Mr. John Glaze was a customer of the defendant bank. In September, 1893, he executed a mortgage of property upon which his business was being carried on to secure his current account to the extent of 2500*l.* The property was then already subject to a mortgage for 2500*l.*, upon which no question arises, and I shall therefore call the bank's mortgage the first mortgage. Comments have been made upon the language of the bank's mortgage, but I agree with Eve J. that it is an ordinary bank mortgage to secure a current account, and that it is wholly immaterial that it is not in the form of a mortgage to secure a definite sum then due on the account and further sums. Any other view would, in my opinion, be technical to the last degree. The bank held other securities for John Glaze's account. A limit was from time to time laid down by the bank, varying according to the securities held by the bank, and, possibly, varying also according to the value of the property, which was improved by John Glaze. At the critical date, namely, December 2, 1895, the limit of his overdraft was 3500*l.* or 3600*l.* On December 2, 1895, a second mortgage was executed by John Glaze in favour of the plaintiff, Mrs. Deeley, to secure 3500*l.* It was expressly subject to the first mortgage, and it included other property of John Glaze. Notice of the plaintiff's mortgage was given on December 2, 1895, to the bank. This was stoutly denied by the bank, but the learned judge, who has seen the witnesses, has held that the proof of notice was clear, and I see no reason to doubt it. It was the habit of the bank, when notice of a subsequent mortgage was received, to draw a line and to commence a new account so as to avoid any question as to the application of the rule in *Clayton's Case.* (1) That was not done in the present case, but the account was continued as an ordinary banking account, balanced periodically, and a pass-book from time to time was sent by the bank to John Glaze, who had, therefore, notice of what had been done by the bank. Moneys were paid by Glaze to the credit of his account, the result of which was that, if the rule in *Clayton's Case* (1) is applied, the whole amount due on the first mortgage, at the date of the notice of the second

(1) 1 Mer. 572.

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mortgage, had been paid off on or about January 6, 1896. John Glaze became bankrupt in 1899. The bank entered and sold the property for an amount just sufficient to pay off their mortgage with interest and costs. This application of the purchase-money was known by the plaintiff and her husband, who was John Glaze's solicitor, but the plaintiff now asserts that the bank is accountable to her, the bank's mortgage being, by virtue of the rule laid down in *Hopkinson* v. *Rolt* (1), postponed to the plaintiff's mortgage. There were many other questions originally raised in the action, but in substance this appeal turns upon the question whether *Clayton's Case* (2) and *Hopkinson* v. *Rolt* (1) suffice to give the plaintiff the priority she claims.

It has been strenuously argued on behalf of the bank that *Hopkinson* v. *Rolt* (1) has no application to a mortgage to secure a customer's current account, and that the subsequent cheques honoured by the bank ought not to be treated as fresh advances, and, further, that the rule in *Clayton's Case* (2) cannot properly be applied for the purpose of defeating or postponing a security. Now in my opinion it is not open to us to accede to either of these contentions. The decision of the House of Lords in *London and County Banking Co.* v. *Ratcliffe* (3), affirming the Court of Appeal, seems to me completely to dispose of this argument. In that case the bank, with notice that their customer had contracted to sell a portion of his property comprised in their security, continued the banking account in the ordinary way, and it was held that *Hopkinson* v. *Rolt* (1) and *Clayton's Case* (2) both applied, and that the amount due at the date of the notice had been completely discharged by subsequent payments into the account, so that the purchaser obtained his property free from any charge by the bank. I do not forget that Ratcliffe was a purchaser, and not a mortgagee, and that by contract with the customer he was a purchaser free from any incumbrance and that he had wrongly paid the whole of the purchase-money to the customer, but in my opinion these facts do not in any way avoid the authority of that case as applicable to the present case. In the language of James L.J. in delivering

(1) 9 H. L. C. 514. (2) 1 Mer. 572.
(3) 6 App. Cas. 722.

the judgment of the Court of Appeal in *Ratcliffe's Case* (1), "We are bound by the decision in *Hopkinson* v. *Rolt* (2) to hold that the advances made after the bank had notice of a change in the beneficial ownership are not charges upon the latter; and it is clear from the bank accounts that all that was due at that time was long since paid off." It is true that there has always been a large amount due to the bank, but then, according to the rule in *Clayton's Case* (3), the credits must be attributed to the debits in order of date, there being nothing special in this case to exempt it from the operation of the rule. In *In re Sherry* (4) Lord Selborne lays down the true meaning and effect of *Clayton's Case* (3): "The principle of *Clayton's Case* (3) and of the other cases which deal with the same subject is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he prima facie appropriates them to that account, and the effect of that is, that the payments are de facto appropriated according to the priority in order of the entries on the one side and on the other of that account."

The only question open to us is whether there is anything special in this case to exclude the rule in *Clayton's Case.* (3) Now it is plain law that if you know nothing more than that the bank has kept an ordinary banking account and communicated it to the customer, the bank must be considered to have appropriated the earliest credits to the earliest debits, but it is equally clear that you are entitled, and indeed bound, to see whether there are any circumstances, including the conduct of the parties, sufficient to justify you in arriving at a different conclusion. The great peculiarity of the present case is that the bank manager, having absolutely denied notice of the second mortgage, of course did not allege that they took any such steps as they would have taken if they had had notice. But the bank manager was not believed, and it may be that we ought to disregard his evidence wholly. When I say that the bank

(1) 51 L. J. (Ch.) 28, 35 (this judgment is not set out in L. R.)
(2) 9 H. L. C. 514.
(3) 1 Mer. 572.
(4) 25 Ch. D. 692, 702.

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manager was not believed, I do not intend to impute to him deliberate misstatements, but it is apparent that when he gave evidence in Court his memory was so failing that the Court could not rely upon him. I may add that the contention of the bank that they had no notice of the plaintiff's mortgage until shortly before this action was, to say the least, bold, for the mortgage itself was deposited with the bank in 1896 to secure John Glaze's account, with a short memorandum of deposit expressly mentioning it. It remains, however, that there is no direct evidence on the part of the bank to exclude the application of the rule in *Clayton's Case.* (1) Further, it seems to me impossible to exclude the application of the rule merely on the ground that the bank cannot have intended to be so foolish as to prejudice their security. If they intended to appropriate, but were not alive to the effect of the appropriation, that will not help the bank.

There are, however, several points made by the bank, from which they seek to infer that not only as between the bank and John Glaze, but as between the bank and the plaintiff, it was agreed by all parties that the rule in *Clayton's Case* (1) should not apply. These facts must be considered in detail. First, it is apparent from the correspondence that the bank, who admittedly believed that their securities had priority, would not allow John Glaze to exceed the limit, which limit was obviously fixed having regard to the value of the bank mortgage, treating it as a first mortgage and not as a second mortgage. Secondly, the plaintiff allowed her husband on four separate occasions to deposit her second mortgage with the bank as security for John Glaze's account, John Glaze being her brother. Thirdly, both the plaintiff and her husband from first to last believed, as the bank did, that the bank's mortgage had priority. Fourthly, when the property was sold the plaintiff and her husband acquiesced in the retention by the bank of their first mortgage debt and did not claim payment of the plaintiff's mortgage debt. Fifthly, the bank held as collateral security a bond by Thomas Glaze for 2000*l.*, and Thomas Glaze received from the plaintiff a counter-bond for 1000*l.* The plaintiff and her husband demanded

(1) 1 Mer. 572.

from Thomas Glaze and obtained the plaintiff's 1000*l.* bond, on the ground that the whole debt due to the bank had been paid off, and apparently—although this is not quite certain—the bank handed back to Thomas Glaze his bond for 2000*l.* I have felt and still feel great difficulty in arriving at a conclusion upon the question whether any of these facts, or all of them taken together, suffice to exclude or negative the rule in *Clayton's Case.* (1) Eve J. in his careful judgment on this point has stated the principles of law in a manner not substantially different from what I have endeavoured to express, but he has come to the conclusion that there are circumstances sufficient to exclude the application of the rule in *Clayton's Case.* (1) He relies to a considerable extent upon a fact, which I have not noticed, namely, that in many instances moneys were paid in by John Glaze for the purpose of meeting particular bills or cheques, and he concludes from this that the banking account was not an ordinary banking account. I am unable to draw this inference. It is true that there were upwards of 130 instances of this nature, all of which were after January, 1896, but there is nothing to suggest that these specific directions by the customer as to the appropriation of these particular items can throw any light upon the other items as to which no specific direction was given by the customer, and which were therefore subject to appropriation by the bank. Moreover, it appears that the bank on more than one occasion objected to this special mode of dealing and required the account to be dealt with in the ordinary way. I therefore cannot see anything in these so-called specific appropriations which supports the bank's contention. Eve J. also attaches great weight to the fact, which I have pointed out, that all parties believed that the bank's mortgage had priority, even to the very last. It seems to me that this really amounts to nothing more than ignorance of the law on the part of all the parties, and I am unable to hold that such ignorance of the result of appropriation can suffice to support a suggestion or inference that no such appropriation was in fact made. I have in the course of the argument been impressed by the transaction when the property was sold by the bank and Thomas Glaze's bond was treated as

(1) 1 Mer. 572.

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satisfied, but on reflection I do not think it sufficient. It is all the result of the common belief, the common mistake, of the parties. I cannot find ground for supporting the view that either Mr. or Mrs. Deeley is estopped by what took place from asserting such rights against the bank as in law they had. Every material fact was within the knowledge of all parties, if indeed it be not correct to say that the bank knew more than the Deeleys. Upon the whole, therefore, I have reluctantly come to the conclusion that the appellant is right upon the only point which has been argued before us, and that the plaintiff's mortgage is entitled to priority over the bank's mortgage. But as the other members of the Court take a different view, the appeal must be dismissed with costs.

FLETCHER MOULTON L.J. This case is one of extreme difficulty, involving the consideration of the principles upon which certain well-known decisions of the Court rest and the application of those decisions to a complicated state of circumstances. I think it therefore best to begin by describing the persons concerned and the surrounding circumstances leading up to the acts the legal effect of which we have to determine.

The persons who play a part in the case are four in number—Mr. John Glaze, now a bankrupt; his sister, the plaintiff; her husband, Mr. Deeley; and Lloyds Bank, the defendants. During the relevant period Mr. Glaze carried on business as an ironfounder, and although he seems to have been in business difficulties throughout, he must have had the power of persuading others that these difficulties were only temporary and that he was on the road to fortune, for he readily obtained credit both from the plaintiff and her husband, who was a lawyer and acted as such both for Mr. Glaze and for his own wife. It is clear that with regard to his wife Mr. Deeley acted not only as her lawyer, but also as her agent with unlimited powers. In her evidence she states frankly that she allowed her husband to have full management of her monetary and other affairs and left him to manage as he thought best, and in particular that in the matter of the mortgage, of which I shall presently speak, she left her rights and interests absolutely and entirely in the hands of her

husband to look after. The connection of Lloyds Bank with Mr. Glaze seems to have begun in June, 1892, when he opened an account with them. His pass-book shews that this was overdrawn almost from the beginning, and accordingly the bank required and obtained security (in the first place to the extent of 1000*l.*) to cover the debit balance of his account. He soon, however, needed further advances, and on September 21, 1893, they obtained from him further security for the overdraft to the amount of 2500*l.* It consisted of a second mortgage on what I will term the Brookmore property, which I understand included Mr. Glaze's works. This property was at the time subject to a first mortgage for 2500*l.* to Thomas Rollison and Robert Meiklejohn, which was at a much later period acquired by the bank, but nothing turns on this in the present case. This state of things continued throughout the years 1894 and 1895.

During the material period, namely, the latter part of 1895, the business relations between Mr. Glaze and the bank were and had for some time been well defined. The bank steadily refused to make him any further advances. They allowed the overdraft to remain at the amount of security which they held, namely, 3500*l.*, but would go no further. At times they might give him a little indulgence, but it was inconsiderable in amount and only for a short time. If he required the overdraft increased he had to deposit temporarily further securities which the bank retained until the overdraft was brought back to its normal amount. This state of things was as well known to Mr. Deeley as to Mr. Glaze, because the arrangements at the bank were generally negotiated by Mr. Deeley, who was thoroughly and intimately acquainted with the state of Mr. Glaze's affairs, and in particular with the condition of his overdraft.

While matters were in this position so far as Mr. Glaze and Lloyds Bank were concerned, John Glaze gave a mortgage of property, which included that which was mortgaged to the bank, to his sister, Mrs. Deeley. This mortgage bears date October 19, 1895, but it was in fact executed on December 2, 1895. It purports to be given to secure a sum of 3500*l.* paid to John Glaze by Mrs. Deeley on or before the execution of the mortgage,

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and the receipt of which by John Glaze is acknowledged therein. There is no doubt that much mystery surrounds this mortgage. The evidence that any substantial amount was ever advanced by Mrs. Deeley to Mr. Glaze rests on the oral testimony of Mr. and Mrs. Deeley without, so far as I can see, any corroboration from documentary evidence. The tale they tell is to my mind most improbable, but the learned judge, who saw the witnesses, has accepted their story, and I think it would not be right for us to go behind his finding, and therefore we must take it that this charge is in the same position as though the sum of 3500*l.* had in fact been paid and became due and owing under the mortgage.

The plaintiff alleged and in the opinion of the learned judge proved that notice was given to the bank of the execution of the mortgage on December 2, 1895, that is to say, on the day of its execution. I am of opinion that we must accept the decision of the learned judge on this point also without question.

The execution of the mortgage to Mrs. Deeley made no difference to the course of business between the bank and Mr. Glaze, in which Mr. Deeley continued to take the same active part, and of which he had the same complete knowledge. The security to the bank was treated by all parties as unaffected by the sub-mortgage to Mrs. Deeley. It was so vital to the interests of all the three parties that the bank should continue Mr. Glaze's account and honour his cheques that from time to time further security was lodged with the bank when it was desired to increase the overdraft. This security must at times have been provided by Mrs. Deeley, for on one if not two occasions the mortgage to her was so lodged for a time. In the year 1898 an attempt was made to convert Mr. Glaze's business into a company, but it failed, and in April, 1899, he became insolvent. The bank then proceeded to realize their security. They had acquired by assignment the prior charge upon the property to which it related, and on sale, after the payment of the prior charge and costs, there remained only sufficient to pay them the 2500*l.* secured by it. They retained this without any objection being made either by Mr. or Mrs. Deeley and with their full assent. Indeed, on the strength of their charge having been

fully paid the bank were asked by Mr. Deeley on behalf of his wife to release a collateral guarantee that had been given by Mr. Glaze's brother for the purpose of securing 2000*l.*, part of the charge, and with regard to which Mrs. Deeley had sub-guaranteed Mr. Thomas Glaze to the extent of 1000*l.* To this the bank assented inasmuch as they had no further claim in respect of the guarantee by reason of their claim having been satisfied by the proceeds of the sale, and accordingly Mrs. Deeley was released from her sub-guarantee. Mrs. Deeley waited for nearly six years without raising any question as to the rights of the bank thus to satisfy its charge out of the proceeds of the sale of the property, and it was not until the bringing of this action in 1905 that she set up the contention that her mortgage had acquired priority over the mortgage of the bank by the operation of the rule in *Clayton's Case.* (1)

The only portion of the claim in this action which is involved in the appeal is this question of priority. The action included other matters, such as an alleged sale by the bank at an under-valuation, but these were decided by the learned judge in favour of the bank, and no appeal has been brought with respect to them.

The argument in support of the plaintiff's claim is as follows. It is contended that under the doctrine laid down in the case of *Hopkinson* v. *Rolt* (2) the mortgage to the bank can only give a charge in favour of advances made prior to December 2, 1895, and that by reason of the rule laid down in *Clayton's Case* (1) the payments into the bank after the date of that notice must be taken as being applied to the discharge of the earliest items on the debit side. If this reasoning be sound, it follows that by the mere activity of the account the whole of the debit items of an earlier date than December 2 were paid off before January 6 of the next year, and therefore by that date the mortgage to Mrs. Deeley had acquired priority over the mortgage to the bank. It is difficult to imagine anything more directly contrary to the intention of every one of the parties taking part in the transactions in question as evidenced by their conduct at the time and subsequently. But of course every one is presumed to

(1) 1 Mer. 572. (2) 9 H. L. C. 514.

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intend the legal consequences of his actions, and it is possible that a result so unjust and so unexpected might be a consequence of the actions of the parties. I am glad, however, to be able to come to the conclusion that this is not so. The plaintiff's contention is in my opinion unsound, and is based on a total disregard of the special circumstances of the case. To make clear the reasoning by which I have come to this conclusion, however, it will be necessary for me to deal more specifically with the language of the two mortgages and the circumstances under which they were given.

The mortgage given by John Glaze to Lloyds Bank Limited dated September 21, 1893, is in the ordinary form. It recites a previous mortgage on the property for 2500*l*., and then recites that the company have permitted the mortgagor to open an account with them, and that there is then due to the company a certain sum of money, and that the mortgagor has agreed with the company to give the mortgage for the purpose of securing such account. It then witnesses that the mortgagor covenants with the company that he will on demand, or if no demand is made in his lifetime then his heirs, executors, or administrators will on his death, pay to the company the balance then due from him on his account current with the company "for cheques notes or bills drawn accepted or indorsed by him or for advances made to him or for his accommodation or benefit or otherwise howsoever." The deed then mortgages the property in the ordinary form, the proviso for redemption being as follows: "provided always that if all moneys before covenanted to be paid shall be duly paid accordingly." A later clause limits the amount secured by the mortgage to 2500*l*. To put it shortly, the mortgage is given to secure the account current to the extent of 2500*l*.

The indenture of mortgage to Mrs. Deeley dated October 19, 1895, covers various properties belonging to Mr. Glaze on which at the time various charges existed. The property to which the mortgage to Lloyds Bank relates is contained in the second schedule of this mortgage. The mortgage itself recites the charge upon such property which was prior to the charge to the bank. It then recites that the bank had permitted the said

John Glaze to open an account with them, and that the said John Glaze had agreed with the bank to execute a mortgage to them "for the purpose of securing such account in the manner thereinafter appearing." It then witnesses that the said John Glaze mortgaged the property subject to the prior charge, and subject also to a proviso for redemption of the said hereditaments on payment of all moneys by the said mortgagee covenanted to be paid. This recital is therefore to the effect that the mortgage to the bank was for the purpose of securing the amount of the account current. The state of that account current appears from a later recital, which states that the principal sum of 3586*l.* 9*s.* 11*d.* with interest then remained owing to Lloyds Bank upon the security—a figure which shews how closely the advance was confined to the amount of the security in the hands of the bank. The deed then proceeds (so far as is here material) to mortgage to Mrs. Deeley the property in question subject to the two indentures of charge and the principal sums and interest thereby secured.

I have not the slightest doubt in my own mind that no one of the parties concerned in the mortgage of October 19, 1895, had any intention of affecting the position of the bank in any way whatever, or had any idea that the execution of that mortgage could have any such effect. In this matter, as in all others, Mrs. Deeley was entirely in the hands of her husband, who, so far as I can see, voluntarily and spontaneously arranged to get her this so-called security, and after the evidence that was given both by Mr. and Mrs. Deeley at the trial I have no doubt that we are bound on all questions of knowledge, consent, and intention to take him as representing her in connection with the business. Both Mr. Deeley (on his own account, and as representing his wife) and Mr. Glaze had the strongest interest in keeping the relations with the bank uninterfered with. To have allowed the security held by the bank to be interfered with would have been fatal to their plans, as is admitted by Mr. Deeley, and is also abundantly clear from the documents in the case. The bank was at the time steadily refusing, and continued afterwards steadily to refuse, to allow to Mr. Glaze an overdraft beyond the amount of the security held by them. They could not,

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therefore, have intended to do anything which would lessen or weaken that security. There is nothing in the giving of the mortgage to Mrs. Deeley which would be understood by any of the parties to conflict with this. The bank had no interest in any margin there might be in the value of the property beyond their charge on it, and it was undoubtedly believed by Mr. Glaze and Mr. and Mrs. Deeley to be of considerably greater value than the charges upon it. It was not unnatural, therefore, that they should think that by giving to Mrs. Deeley a charge upon that margin they were not in any way interfering with the rights of the bank. The language of the indenture itself is quite consistent with this interpretation, for it expressly states the charge to Mrs. Deeley to be subject to the bank and the principal moneys and interest payable thereunder. I am satisfied, therefore, that both Mr. Glaze and Mr. Deeley, as representing his wife, understood and intended the charge of 2500*l.* to remain a continuing charge in priority to the mortgage to Mrs. Deeley to secure to that extent the balance of Mr. Glaze's account, not only at the moment but in the future; and in his cross-examination he admitted that in all his transactions with the bank on behalf of Mr. Glaze he took this to be the case and knew that the bank also so considered it.

But although I am satisfied that the intention of the parties was to do nothing which could possibly interfere with the arrangements with the bank as to the account continuing to be secured by their mortgage to the extent of 2500*l.*, and although there is nothing in the language of the mortgage inconsistent with that intention, it would in view of the decided cases be unsafe to give this interpretation to the language of the mortgage to Mrs. Deeley so as to attribute to it this effect by virtue of its terms alone and without regard to other circumstances. The case of *Hopkinson* v. *Rolt* (1) lays down clearly that where there exists a mortgage for past and future advances the mortgaged property still belongs to the mortgagor at each moment subject to the advances then made, and that a second mortgage is such a disposition of the property at the moment in the mortgagor that after notice of it has been given to the first mortgagee

(1) 9 H. L. C. 514.

it takes precedence of subsequent advances under the earlier mortgage. Comparing the form of the mortgages in this case with those in *Hopkinson* v. *Rolt* (1) and *Ratcliffe's Case* (2), I cannot see any such substantial difference in language as would prevent the application of the law there laid down if the circumstances of the case were such as there existed and with regard to which that decision was given. But the circumstances in this case present differences of a fundamental character, and we must examine carefully the grounds of these decisions in order rightly to apply the law there laid down to the facts of the present case.

The principle of the decision in *Hopkinson* v. *Rolt* (1) is laid down very clearly by Lord Campbell in giving the leading opinion in that case. He there says (3): "Although the mortgagor has parted with the legal interest in the hereditaments mortgaged, he remains the equitable owner of all his interest not transferred beneficially to the mortgagee, and he may still deal with his property in any way consistent with the rights of the mortgagee. How is the first mortgagee injured by the second mortgage being executed, although the first mortgagee having notice of the mortgage, the second mortgagee should be preferred to him as to subsequent advances? The first mortgagee is secure as to past advances, and he is not under any obligation to make any farther advances. He has only to hold his hand when asked for a farther loan." It is also very clearly explained by Lord Blackburn in the case of *Bradford Banking Co.* v. *Briggs* (4), where he says: "It seems to me to depend entirely on what I cannot but think a principle of justice, that a mortgagee who is entitled, but not bound, to give credit on the security of property belonging to the debtor, cannot give that credit after he has notice that the property has so far been parted with by the debtor." It will be seen from the consideration of these reasons that the only case to which their Lordships are directing their attention is a case where the subsequent advances are made voluntarily and are sought to be used to the prejudice of the second mortgagee. They do not in my opinion apply to a case in which the position of the second mortgagee is not in

(1) 9 H. L. C. 514.
(2) 6 App. Cas. 722.
(3) 9 H. L. C. 534.
(4) 12 App. Cas. 29, 37.

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anywise prejudiced by the subsequent transactions between the parties, and where those transactions do not either ultimately or at any moment increase the burden of the prior charge. It is so in the present case. Counsel for the plaintiff treat each cheque honoured by the bank after December 2, 1895, as a fresh advance voluntarily made by the bank and therefore increasing by so much the charges asserted in priority to Mrs. Deeley's mortgage. It was not so in fact. The bank were refusing to increase their advance to Mr. Glaze, and accordingly moneys had to be paid in from time to time to induce the bank to honour the cheques which he drew upon his account, as otherwise they would have been dishonoured. The limit of the charge to the bank on this property was 2500*l.*, and this was wholly taken up by the overdraft. The amount of the payments in to meet cheques drawn by Mr. Glaze was calculated on the basis of this overdraft being covered by the security but exhausting it, and therefore the amounts paid in had to be equal to the cheques which were to be honoured or additional security had to be lodged to make up the difference. The payments made by the bank were made because an equivalent amount of money (or additional security) had been or had to be paid in on the credit side on the understanding that cheques to an equal amount would be honoured against it, and it was only by reason of the bank so honouring the cheques that payments continued to be made on the credit side. If the bank had refused to honour the cheques the payments into the account would instantly have ceased, and this was fully known to all the parties, and was the basis under which the transactions took place. The further transactions consisted of payments out in consideration of equivalent payments in and payments in in consideration of equivalent payments out. Under such circumstances neither the reasoning of Lord Campbell nor the broad principles of justice referred to by Lord Blackburn appear to me to have any application. The overdraft remained substantially unchanged by these subsequent transactions and was intended by all parties so to remain, and on the principle laid down in *Hopkinson* v. *Rolt* (1) I cannot see why that charge which

(1) 9 H. L. C. 514.

covered it at the date of the mortgage to Mrs. Deeley did not continue to cover it throughout in spite of these transactions which were intentionally arranged so as not to affect it. By their nature they could not increase the amount of the prior charge nor alter to his disadvantage the position of the subsequent incumbrancer.

The only way in which the plaintiff can establish her case is by saying that the Court is bound in the circumstances of this case to apply blindly the rule in *Clayton's Case* (1), and to take each payment in as being appropriated by the bank to diminish the secured part of the overdraft and to take each payment out as a voluntary unsecured fresh advance. To my mind the suggestion is false in every particular. The rule in *Clayton's Case* (1) is only a rule of evidence, and it amounts to saying that where there is an account open between two parties and payments are made without any indication of the purpose to which they are to be applied either on the part of the payer or the payee the Court will, in the absence of all evidence as to appropriation by either of the parties, presume that the payee intended them to be applied to the earliest undischarged items of the account. As Lord Macnaghten says in the case of *The Mecca* (2), "Where the election is with the creditor, it is always his intention expressed or implied or presumed, and not any rigid rule of law that governs the application of the money." In the present case there is the clearest evidence, by the behaviour of both the debtor and the creditor, that the payments were not so applied by either party as to affect the continuance or amount of the security. The evidence of Mr. Deeley is conclusive as to this. The amounts Mr. Glaze was allowed to draw were calculated on this basis, all parties so treating the situation that there was an overdraft of 2500*l.* secured, and that accordingly the cheques out should balance the payments in. Where that would not have been the case, and the cheques out would have exceeded the payments in so as to increase the overdraft and leave it in their view partly unsecured, Mr. Deeley, on behalf of Mr. Glaze, used to have to deposit, as I have said, further security, which was held by the bank until the status quo had

(1) 1 Mer. 572. (2) [1897] A. C. 286, 294.

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been restored. To my mind it is impossible to come to any other conclusion than that the payments in were taken by both parties to be made on terms that equivalent payments out should be made by the bank, and that these payments were to be so appropriated as not to affect in any way the security held by the bank. If this be so we are bound, if it be legally possible, so to appropriate them. To my mind it makes no difference whether or not the parties at the time knew how legally so to appropriate them. Actual appropriation never takes place. It is a pure fiction of law. What is termed appropriation is a conclusion drawn by law as to the intention of the two parties or one of them. For it must be remembered that appropriation depends upon the payer and the payee, and no third party has a right to interfere, although when as between the payer and the payee the appropriation has been settled in any particular way the rights of the third parties may be affected by it. Nor is there any legal necessity that a payment in should be appropriated consciously or by implication to the discharge of any one particular item of indebtedness fixed upon at the time. For instance, suppose that the creditor says "I accept this in part discharge of whatever debts are not covered by security." That would be a good and binding appropriation even though the creditor did not know at the time to what debts his security related. In the present case Mr. Glaze would have treated it as a breach of faith if the bank had announced to him that a payment which he had made to them diminished the security for his overdraft, and that they would not therefore cash cheques against it, and on the other hand the bank by their conduct again and again informed Mr. Glaze that they had not so appropriated the payments made by him as to affect the secured portion of the debt. How is it then possible (using the words of Lord Macnaghten) to declare that there is here "an intention expressed or implied or presumed" that the payments in should be applied in the discharge of past advances so as to give priority to the subsequent charge when the whole conduct of the bank was, and was known by all parties to be, a stubborn refusal to affect in any way their position as to security or to give any indulgence to Mr. Glaze beyond the existing secured

overdraft? In my opinion the position of the bank is rightly described by the commercial phrase which I have already used. They were steadily refusing, and always did refuse, "to make further advances" to him, and in my opinion they did not make at any time further advances in the sense which must be given to those words in order to apply the decision in *Hopkinson* v. *Rolt* (1), and, further, that the intention of all parties was, and was known by all parties to be, that the payments in should not be appropriated, that is applied, so as to affect the security of the bank, and that it was only on such terms that the further transactions took place.

The above considerations afford a complete answer to the argument that the return of the pass-book to Mr. Glaze was a communication to him from the bank to the effect that they had appropriated the payments in according to the rule in *Clayton's Case*. (2) In the present case, where all the parties knew that the payments in were so appropriated as to leave the secured balance undiminished, the receipt of the account made up in the pass-book (which is primarily for the purpose of shewing the amount of the balance) would not be intended on the one hand, or understood on the other, to mean anything inconsistent with this. Although the pass-book passed backwards and forwards the parties by their conduct shewed that they recognized that the secured portion of the overdraft was undiminished. This is proof that they did not regard the account appearing in the pass-book as indicating any such appropriation as is contended for by the plaintiff. It is absurd to say that an act operates as a representation to a person when it is shewn that it was not intended as such or taken by him to be such.

I will not dwell in detail on the subsequent conduct of the parties. The fact that the parties concerned acted on the common basis that the security of the bank to the amount of 2500*l.* was unaffected in any way, either as to position or amount, by the mortgage to Mrs. Deeley or by the subsequent transactions is not denied. But there is one matter which merits special reference because it relates directly to the plaintiff. I have already stated that in 1898, when the sale took place, Mr. Deeley

(1) 9 H. L. C. 514. (2) 1 Mer. 572.

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on behalf of his wife asked the bank to release Mr. Thomas Glaze from his guarantee of 2000*l.* on the ground that they had been fully paid the 2500*l.* under the mortgage and therefore had no claim on the guarantor. This they did, and thereby Mrs. Deeley was discharged from her sub-guarantee of 1000*l.* to Mr. Thomas Glaze. To my mind this creates an estoppel against her as far as any claim to priority is concerned. It is no answer to say that she did not intend to waive her claim because she did not know that she could set up any such claim. She knew all the facts, and her ignorance, if any, must be of the legal consequences of those facts. The bank never intended to allow their priority to be defeated by their subsequent advances, and if it is to be said (contrary to my view of the law) that they must be held to have done so because they must be taken to have known their legal rights and are estopped from saying that those acts were done in ignorance of those legal rights, the same measure must be meted out (with much greater justice) to the plaintiff, and she cannot now be heard to assert rights inconsistent with her action in 1899 whereby she induced the bank to release a claim of 2000*l.*, to her own substantial benefit.

For these reasons I am of opinion that the mortgage to Mrs. Deeley has not obtained priority over that to the bank, and that this appeal should be dismissed with costs.

Although I base my judgment on the special facts of the case, I wish to add a word on what I think should be the result of the application of the law laid down in *Hopkinson* v. *Rolt* (1) to the ordinary case of a mortgage to a banker to secure the balance of a customer's account. When the bank receives notice of a second mortgage by the customer to a third person it does not in my opinion affect the nature of the security. It remains a security for the balance of the account from moment to moment. But it puts a limit to the amount of that security. It cannot be increased beyond the balance at the date of the notice, but it may be diminished. If the debit balance is at any moment brought lower than this by the subsequent payments in and out, the secured amount is correspondingly reduced, and once reduced cannot again be raised. This fully satisfies the broad principle

(1) 9 H. L. C. 514.

of justice referred to by Lord Blackburn and does not unnecessarily interfere with the position of the prior incumbrancer. All this is altered if the rule in *Clayton's Case* (1) is to be applied in the manner contended for by the plaintiff. The security is no longer for the balance of an account, but for certain items on the debit side. In all their subsequent transactions the bank are presumed to have the intention of applying all payments in to the destruction of their own security in favour of the subsequent mortgagee, although no sane man or sane jury could doubt that they meant to do exactly the contrary. And this is not by virtue of any rule of law. It purports to be the consequence of a rule of evidence—a conclusion of common-sense—to the effect that where there is nothing to indicate actual appropriation it is natural and proper to suppose that the eldest debit items are intended to be wiped out first. This is good common-sense where the items are on an equality, but not otherwise. Where some are secured by virtue of their being antecedent to the second mortgage no sane man would dream of extinguishing them in preference to the subsequent unsecured ones when it was a matter left to his choice. How, then, can we impute to him such an intention? What is the consequence of our so doing? If the bank are not aware of the pit dug by the law for them they find their security gone. The second mortgage is put before the first mortgage because the law presumes in them an intention the very suggestion of which is ridiculous. If, however, they know of the pitfall they go through the simple formality of drawing two horizontal lines in their books and make believe to commence a new account and they are safe. I say "make believe," for it is not in truth a new account. That can only be started by arrangement with the customer. If the payments in to this so-called new account shew a balance to credit the subsequent mortgagee can claim the benefit of them, because in truth it forms part of the account for which the security was given. The whole result of the formality is that the bank are placed in precisely the position which I have first described. The security remains a security for the balance of an account, but the amount of that security cannot be raised, but may be automatically reduced.

(1) 1 Mer. 572.

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Why should it be necessary to go through such a formality to effect this? The law has refused to apply the rule in *Clayton's Case* (1) so as to work a wrong. Why should it apply it to cases where it would be to presume on the part of the prior incumbrancer an act of suicidal folly? No good is done thereby—it only entraps those who are unaware of the danger.

In the simple case, therefore, of a secured account with subsequent payments in and payments out I am of opinion that the presumed intention should be to apply the payments in to the unsecured items in order of date in priority to the secured items. But in a more complicated case, where the inference of intention derived from the surrounding circumstances may not be so clear, or where the transactions are more complex, the law may well find itself justified in falling back on the rule in its simple form. This may be the explanation of the decision in *Ratcliffe's Case* (2), where the circumstances were very peculiar. It ought not, I think, to be taken as warranting the proposition that in the simple case of a secured overdraft the Courts are bound to the absurdity of presuming an intention on the part of the bank which it knows to be purely imaginary and to be contrary to the dictates of common-sense.

BUCKLEY L.J. The rule in *Clayton's Case* (1) is a rule of evidence, not a rule of law. The rule is that for the purpose of ascertaining the manner in which sums have been appropriated by a creditor the entries in a current account kept by the creditor and communicated to the debtor are admissible as evidence to shew that the earliest item of credit is appropriated towards discharging the earliest item of debit. If a banker holds a security given by his customer for his current account, and the customer pays sums to the credit of his account without directing (as he may) how they shall be appropriated, the banker is entitled to appropriate them as he chooses. The rule in *Clayton's Case* (1) is that an account rendered by the banker to his customer is evidence of appropriation made by the banker of the earliest items of credit on the one side to

(1) 1 Mer. 572. (2) 6 App. Cas. 722.

the earliest items of debit on the other. The entries in the pass-book are as against the banker prima facie evidence that he has appropriated the amounts as shewn in the account appearing in the pass-book, and the effect of such an account communicated to the customer is (in the absence of evidence to the contrary) that the payments are de facto appropriated according to the priority in order of the entries on the one side and on the other side of the account. Where the customer has not directed any appropriation the election is with the bank. It is the intention of the bank, expressed, implied, or presumed, that governs the matter, and the rule in *Clayton's Case* (1) is that the entries are evidence of appropriation in the manner above stated.

A banker who holds a mortgage to secure current account is as between himself and his customer indifferent (if no question arises upon the Statute of Limitations) as to which are the debit items in the account which are to be taken to make up the debit balance for which he holds security. But so soon as the rights to be considered are not those as between the banker and his customer only, but include those as between the banker and a third party deriving title under the customer by virtue of a disposition made by the customer to such third party subsequent to the disposition in favour of the bank, there arises the question in *Hopkinson* v. *Rolt*. (2) The principle lying at the root of *Hopkinson* v. *Rolt* (2) is that a person cannot dispose of his property twice over to different persons. A security in favour of a bank to secure a sum and further advances operates in the case of each further advance as a further disposition of the property made at the date of the further advance which takes effect by force of the antecedent deed of security. But if before such further advance has been made the owner of the property has already disposed of the property to a third party, say a subsequent mortgagee, and the holder of the first mortgage has notice, then the subsequent disposition takes priority over the further advance made upon the security of the earlier disposition. The principle of *Hopkinson* v. *Rolt* (2) extends to the case in which the principle of *Clayton's Case* (1) is involved. That was

(1) 1 Mer. 572. (2) 9 H. L. C. 514.

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expressly decided in the House of Lords in *London and County Banking Co.* v. *Ratcliffe*. (1) That was a case not of a subsequent mortgagee, but of a purchaser. But a subsequent mortgagee is a purchaser, and for all purposes relevant to the present matter purchaser and mortgagee cannot be distinguished. In *London and County Banking Co.* v. *Ratcliffe* (1) the purchaser agreed with the mortgagor to buy free from incumbrances. He had no contract with the mortgagee bank. He had notice of the bank's mortgage. But, nevertheless, when he came to complete he paid his purchase-money, not to the mortgagee bank to the extent of the mortgage and to the vendor as to the balance, but paid the whole purchase-money to the vendor. The bank had notice of the sale. The vendor subsequently in account current paid the bank the amount due at the date of the notice, and it was held that the rule in *Clayton's Case* (2) applied. It is noticeable that the payment to the bank and its appropriation upon the principle of *Clayton's Case* (2) was rightful both as regards the conduct of the vendor, for it was in performance of the duty which the vendor owed the purchaser, and as regards the conduct of the bank, for they had notice of the sale. Had this not been so the person paying the mortgage debt might have been subrogated to the bank's right as mortgagee. It is not the fact, therefore, as Mr. Astbury argued, that to say that the principle of *Clayton's Case* (2) is applicable to such a case as the present involves the conclusion that a purchaser of an equity of redemption would by applying *Clayton's Case* (2) become the owner of a property free from incumbrances upon the payment of a price agreed for the purchase of an equity of redemption.

There was here an account so kept and rendered by the bank to its customer as that in the absence of anything further *Clayton's Case* (2) applies. The respondents argue that it is here excluded either, first, by contract, or, secondly, by conduct; that either the instruments or the acts of the parties were such that the Court ought to find that the bank did not elect to appropriate as *Clayton's Case* (2) would infer, or if they did that the third mortgagees contracted with the second mortgagees that the bank debt as it existed on December 2, 1895, should

(1) 6 App. Cas. 722.

(2) 1 Mer. 572.

for the purpose of adjusting rights between the bank and the third mortgagees remain or be treated as remaining alive.

The point upon contract is rested in the first instance upon the language of the deeds of September 21, 1893, and October 19, 1895. [The Lord Justice then discussed the words of the deeds, and proceeded:—] Upon the language of these instruments, therefore, I think that no contract is made out to displace the principle of *Clayton's Case*. (1)

It remains, however, to consider how the matter stands upon the second alternative, that of conduct. Here there seem to me to be two matters to investigate—first, whether upon all the facts of the case the prima facie evidence arising from the application of *Clayton's Case* (1) is met by other evidence which turns the balance in favour of the bank in ascertaining which are, as between the bank and the mortgagor, the debit items in the current account for which the security stands good; and, secondly, whether, if that question is to be answered by saying that as between the bank and the mortgagor *Clayton's Case* (1) applies, there is, nevertheless, evidence that as between the third mortgagees and the bank it was agreed that the bank debt existing on December 2, 1895, should for the purpose of adjusting rights as between those two parties remain or be treated as remaining alive, or that the third mortgagee has so acted as that she is estopped from denying that the bank is entitled in priority.

The facts relevant to this part of the case are quite shortly as follows. Glaze was a trader who for many years before December 2, 1895 (the date of the plaintiff's mortgage), had enjoyed banking facilities given him by the defendants. He was allowed a certain overdraft which varied from time to time, and he had on September 21, 1893, executed to the bank the mortgage of that date to secure his account current. The security was to stand for a sum not exceeding 2500*l*. The limit of overdraft was a larger sum which was varied from time to time. There are ample materials for shewing that the bank were in 1895 keeping their customer tightly and closely to the limit of the overdraft which they had granted him; that he was from time to

(1) 1 Mer. 572.

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time wanting further facilities; that Deeley, who was his solicitor and largely acted for him in his transactions with the bank, knew that he wanted, and in fact sought to obtain for him, these further facilities; and that on December 2, 1895, when the plaintiff's mortgage was executed, the attitude of the bank was, and Deeley knew that it was, that the bank would not go beyond the limit which they had fixed, and that that limit was fixed upon the footing that for 2500*l.*, part of the overdraft allowed, the bank had the security of the mortgage of September 21, 1893, as a second mortgage subject only to the first mortgage of August 28, 1891. [The Lord Justice then stated that the evidence of Wilkinson, the bank manager, must be disregarded for all purposes, because, as Eve J. had held, he had lost his memory, and proceeded:—]

That evidence being set aside, there is no affirmative evidence on the question of intention expressed by the bank between December 2, 1895, and the first week in January, 1896 (at which latter date the debt as at December 2, 1895, would by the application of *Clayton's Case* (1) have been discharged), given by any witness for or against the bank, and the finding upon this question of fact must turn upon inference, including the inference arising from *Clayton's Case.* (1) If *Clayton's Case* (1) be applied the debit balance of December 2, 1895, was paid off about the first week in January, 1896. There is no direct evidence and no letter shewing what was in fact the intention between those dates. There is a letter of December 30, 1895. It is one written by Glaze to the bank manager asking for facilities. If the plaintiff's view be correct the facts were that at that date the bank had so appropriated upon the principle of *Clayton's Case* (1) as that there was no debit for which they held security by way of second mortgage, except an amount of about 200*l.* or 300*l.*—in other words, the bank's position was vitally affected as regards the overdraft and the security for the overdraft. But on December 30 Glaze was approaching them obviously on the footing that the bank's position was what it always had been, and that he could fairly ask them to let him have such small sums as 50*l.* or 75*l.* over

(1) 1 Mer. 572.

the amount of overdraft allowed him. Subsequently to this date there are many requests, some made by Glaze and some by Deeley, to a similar effect. In all these communications reference was, if not expressly, at any rate by inference, made to the limit of overdraft allowed; and to condescend upon the limit allowed was by inference to condescend upon the terms upon which it was allowed, and was to assert the existence of the bank's mortgage as a second mortgage. At an earlier date, namely, in October and November, 1895, just before the crucial date of December 2, 1895, there is other similar material. For instance, Deeley on October 17 offered a temporary further security in order to get a further sum, and on October 19 redeemed that further security. The negotiations are numerous, both before and after December 2, 1895, which go to shew that the bank were holding Glaze tight to the position, and the position was that overdraft was allowed to a certain amount if 2500*l.*, part of the amount, was secured by second mortgage.

Leaving this part of the case and coming to a later date, Glaze became insolvent in April, 1899, and the bank in May, 1899, having taken a transfer of the first mortgage, sold the property included in their security and out of the proceeds of the sale took the amount due on the first mortgage, and also the 2500*l.* expressed to be secured by the second mortgage—that is to say, acted as if the security of September 21, 1893, were for all purposes effective; and they did so with Deeley's knowledge, and as the result of it Deeley asked them to do, and the bank did, certain acts which could only have been done upon the footing that the bank were rightly taking that 2500*l.* as second mortgagees out of the proceeds of the security. All this was completed in May, 1899, and it was not until April 29, 1905, that the writ in the present action was issued. Deeley in his evidence has stated quite plainly that he throughout thought, and that he has no doubt that the bank thought from first to last, that the bank mortgage ranked in priority to the Deeley mortgage, and upon that footing Deeley obtained the return and cancellation of the guarantee which Mrs. Deeley had given to Thomas Glaze by way of counter-guarantee for a guarantee which Thomas Glaze had given to the bank for John Glaze's

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liability. It is in this state of facts that the rule in *Clayton's Case* (1) is said to be applicable. As a judge of fact looking at all these circumstances, and dealing with Wilkinson's evidence in the way in which I have dealt with it, I come to the conclusion that the result which would prima facie ensue from the application of *Clayton's Case* (1) in the absence of further evidence is here excluded. I cannot bring myself to doubt that the bank never intended to appropriate as in *Clayton's Case* (1), and if that be so, then *Clayton's Case* (1) is no decision that I am bound to say that the earliest credits went to pay off the earliest debits.

The other ground of decision arises in this way. As matter of fact no distinction is, I think, to be drawn between Deeley and his wife in this matter. Deeley so acted after the property was sold and the 2500*l.* paid to the bank as that the bank gave up any claim upon Thomas Glaze's guarantee. Further, Deeley from time to time obtained from the bank, upon the footing, as I think, that the bank's mortgage was still subsisting with priority over the Deeley mortgage, further sums to support the business of John Glaze, in whose support Deeley was so largely interested. In that state of facts I think that Deeley cannot be heard to say that the bank mortgage is not a security having such priority as would be enjoyed by the security upon the faith of whose existence he obtained from the bank the advances which I have described. I notice that Eve J. determined the case upon the footing that *Clayton's Case* (1) did not apply. In this I do not agree. I think that *Clayton's Case* (1) did apply, but that as matter of evidence the appropriation which would but for other evidence be held to result from the rule in *Clayton's Case* (1) is here excluded by the facts. I think that the appeal fails and should be dismissed with costs.

Solicitors: *Field, Roscoe & Co., for Jobson & Marshall, Dudley; Pretor W. Chandler, for Hooper & Fairbairn, Dudley.*

(1) 1 Mer. 572

J. R. B.

In re FREEMAN.
HOPE *v.* FREEMAN.

[1909 F 883.]

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1909
JOYCE J.
Nov. 27;
Dec. 8, 15.
1910
C. A.
April 8.

Will and Codicil—Construction—Implied Revocation—Appointment of B. N. as Executor—Legacy as Executor—Share of Residue—Codicil—Revocation of Appointment and Legacy—Substitution of H. F. as Executor—Will to take effect as if H. F. were inserted throughout instead of B. N.

A testator appointed B. N. to be one of the executors and trustees of his will and bequeathed to him, if he should prove the will, and in addition to any other benefit to which he might be entitled under the will, a legacy of 1000*l.*, and ultimately gave a share of residue to B. N. By a codicil the testator, after referring to the appointment of B. N. as an executor and to the legacy of 1000*l.*, revoked the appointment and legacy and appointed H. F. to be an executor in the place of B. N., and gave H. F. a legacy of 200*l.* for his trouble in acting as such executor and declared that his will should be construed and take effect as if the name of H. F. were inserted in his will throughout instead of the name of B. N :—

Held, that the general direction at the end of the codicil did not operate as an implied revocation of the gift of the share of residue to B. N.

ADJOURNED SUMMONS.

By his will, dated May 29, 1907, the testator (by clause 2) appointed Sir T. C. Hope, Bowyer Nichols, and his nephew F. F. Freeman to be executors and trustees of his will, and he bequeathed "to the said Bowyer Nichols if he shall prove my will and in addition to any other benefit to which he may be entitled under this my will the sum of one thousand pounds free of legacy duty." After bequeathing various pecuniary legacies, including a legacy in a certain event to Mrs. Bowyer Nichols, the testator (by clause 6) gave all his estate and effects whatsoever and wheresoever as well real as personal unto his trustees upon trust to sell, call in, and convert the same into money, with power to postpone such sale and conversion for such period as they might think proper, and out of the proceeds of such sale and conversion and out of his ready money to pay his funeral and testamentary expenses and debts and the legacies thereinbefore

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bequeathed and the duties thereon, "and to pay the residue of the same moneys unto and equally between the said Lady Duckworth Bowyer Nichols and G. F. Leverson or such of them as shall survive me."

The name Bowyer Nichols occurred nowhere else in the will than as above stated.

By a codicil dated July 29, 1908, the testator, after "firstly" bequeathing an additional legacy to a nurse, proceeded as follows: "Secondly by my said will I have appointed Bowyer Nichols to be one of the executors thereof and I have given him a legacy of one thousand pounds for his trouble in acting as such executor Now I hereby revoke the appointment of the said Bowyer Nichols as such executor and also the said legacy of one thousand pounds given to him as aforesaid And I appoint Harry Freeman of 26 Carlisle Terrace Plymouth in the county of Devon to be an executor of my said will in the place of the said Bowyer Nichols, and I give to the said Harry Freeman a legacy of two hundred pounds free of legacy duty for his trouble in acting as such executor And I declare that my said will shall be construed and take effect as if the name of the said Harry Freeman were inserted in my said will throughout instead of the name of the said Bowyer Nichols and in all other respects I confirm my said will."

The testator died on April 3, 1909, and his will and codicil were duly proved by the plaintiff, Sir T. C. Hope, and the defendant H. Freeman, the surviving executors named in the will.

The testator's clear residuary estate was approximately of the value of 50,000*l.*

The plaintiff took out this summons against the defendants Harry Freeman and Bowyer Nichols for the determination of the question whether the defendant Harry Freeman or the defendant Bowyer Nichols was entitled to the share of residue which was by the testator's will given to the defendant Bowyer Nichols.

The original codicil was produced at the hearing and the further details concerning it appear in the judgment. The summons came on for hearing before Joyce J. on November 27, 1909.

Austen-Cartmell, for the plaintiff.

Hughes, *K.C.*, and *Byrne*, for the defendant Freeman. The important word is the word "throughout"; the will is to be read and construed as if the defendant's name were inserted "throughout" instead of the name of Bowyer Nichols. There is no ambiguity and nothing to indicate a mistake.

The Court will not set aside the effect of clear and unambiguous words because there is reason to suppose that they do not produce the effect which the testator intended they should produce: per Lord Cottenham in *Earl of Hardwicke* v. *Douglas*. (1) But here there is nothing to indicate that there is anything in the words contrary to what the testator intended. The revocation of the prior gift need not be express: *Kermode* v. *Macdonald*. (2)

In re Percival (3) is distinguishable, for there was a recital in that codicil tending to shew that the testator was only dealing with certain articles; and instead of the word "throughout" the more restricted phrase "in all respects" was used.

Younger, *K.C.*, and *Luxmoore*, for the defendant Nichols. This defendant was to have the legacy and the share of residue for quite different reasons; the former was for his trouble in proving the will. We submit that the part introduced by "secondly" refers only to the executorship and the substitution of one executor for another. The appointment of this defendant as trustee was not revoked or affected. There was a trust for sale in the will.

The word "throughout" was inappropriate and inapt for the revocation of the gift of residue and the substitution of another legatee. The legacy of 200*l*. in the codicil to the defendant Freeman is not followed by the words "in addition to any other benefit to which he may be entitled" as was the case in the will when the testator meant both a legacy and share of residue to be taken by the same person. The testator gets rid of the two things mentioned in the recital by appointing another person as executor and by giving him a legacy as such, and the

(1) (1840) 7 Cl. & F. 795, 815. (2) (1868) L. R. 3 Ch. 584.
(3) (1888) 59 L. T. 21.

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words that follow are nothing more than general words carrying out that revocation.

The revocation of a gift must be clear and certain: *Cleoburey* v. *Beckett.* (1) To treat these words as unambiguous would be to defeat the intention of the testator: *Earl of Hardwicke* v. *Douglas.* (2) It is possible to put such a construction on the will and codicil that they can stand together, and we submit that the codicil must be read only with reference to the revocation: *Hearle* v. *Hicks* (3); *In re Percival.* (4)

Hughes, K.C., in reply. To ask the Court to say that the word "throughout" does not revoke the gift of residue is asking it to embark upon conjecture. The codicil cutting down the gift in the will is unambiguous and the plain intention of the testator must be followed: per Lord Campbell L.C. in *Randfield* v. *Randfield.* (5)

Cur. adv. vult.

1909. Dec. 15. JOYCE J. read the material parts of the will as above set out, and continued:—Now I observe that the name of Bowyer Nichols occurs in this will three times, once in the appointment of executors and trustees, again in the bequest of the legacy of 1000*l.* to him if he prove the will, and thirdly in the disposition of the residue equally between Lady Duckworth, Bowyer Nichols, and G. F. Leverson.

By a codicil dated July 29, 1908, the testator "firstly" gives to his nurse 400*l.*; that is in addition to a previous legacy to her in the will. "Secondly" he says "by my said will I have appointed Bowyer Nichols to be one of the executors thereof and I have given him a legacy of one thousand pounds for his trouble in acting as such executor Now I hereby revoke the appointment of the said Bowyer Nichols as such executor and also the said legacy of one thousand pounds given to him as aforesaid"—saying nothing whatever about the one-third of the residue which he has bequeathed to the same gentleman. Then he goes on to appoint Harry Freeman to be an executor

(1) (1851) 14 Beav. 583.
(2) 7 Cl. & F. 795.
(3) (1832) 1 Cl. & F. 20.
(4) 59 L. T. 21.
(5) (1860) 8 H. L. C. 225, 235.

of his will in the place of the said Bowyer Nichols and to give to the said Harry Freeman a legacy of two hundred pounds free of legacy duty for his trouble in acting as such executor. So far no difficulty arises, but then come these words: "And I declare that my said will shall be construed and take effect as if the name of the said Harry Freeman were inserted in my said will throughout instead of the name of the said Bowyer Nichols and in all other respects I confirm my said will." This codicil is attested by a solicitor, and the original, when seen, appears to have been engrossed either in a solicitor's office or by a law stationer, and I infer that this codicil was prepared either by the solicitor or at least by the conveyancing clerk to the solicitor who attested it. It is in a sense divided into heads. "Firstly," there is the alteration of the legacy to the nurse; "Secondly," there is the change in the name, in the personnel, so to speak, of the executors; but then without finding any "Thirdly" we have the words "And I declare that my said will shall be construed and take effect" &c. As I have said, there is nothing expressly revoking the disposition of the one-third of the residue given to Bowyer Nichols. These words "And I declare" do not appear to begin a new paragraph or heading. It is true that the words "And I declare" are written in a larger hand, but so also are the words "firstly," "secondly," and "I appoint." There is no full stop before "And I declare," nor indeed, according to my recollection, is there any punctuation of the will in any respect. This word "throughout" in this clause "And I declare that my said will shall be construed and take effect as if the name of the said Harry Freeman were inserted in my said will throughout instead of the name of the said Bowyer Nichols" is not in any view of the case accurate, because if the name of Harry Freeman were to be read throughout instead of the name of Bowyer Nichols, then it must be so read in the gift of the legacy of 1000*l.* to Bowyer Nichols. Of course that was not intended, because there is an express revocation of that legacy; but still the word "throughout" is not accurate, and, as a matter of fact, omitting all reference to the alteration in the appointment of executors and in the gift of the legacy to Bowyer Nichols, the name

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Joyce J.

"Bowyer Nichols" only occurs in one other place, namely, in the disposition of the residue.

It is contended on the one hand that I must take the words strictly and literally, and that by reason of these words the one-third of the residue previously given to Bowyer Nichols is now to be given to Harry Freeman. On the other hand it is contended that these words "And I declare" and so on are merely supplementary to the change in the appointment of executors, and that although, if we read them strictly, they may be taken to mean a change of the name in the disposition of the residue, yet what it really means is "I change the name throughout my will in the reference to or mention of executors." The words "I declare that my said will shall be construed" and so on are really common form. Certainly the later forms are more exact; but it so happens that the very first form that I turned to of a codicil which is executed merely for the purpose of altering the appointment of executors and substituting one name for another was in Hayes and Jarman's Concise Forms of Wills: the words used are "shall take effect as if the names . . . . had been originally inserted throughout the said will instead of the names of the said" &c. Of course that is right where there is no other gift or benefit given to the executor. In another conveyancing book at which I looked the draftsman is warned against the use of this form, as it might raise difficulty, and another form is given. However, it is common form, and if in this case the draftsman had really intended to alter the disposition of the residue, I should have expected either a new paragraph or heading beginning with "Thirdly," or I should have expected to have an express revocation of the gift of one-third of the residue to Bowyer Nichols; and it is almost impossible to my mind to believe that a draftsman of any knowledge or experience could have intended to alter the disposition of the residue merely by such words as these not commencing a new paragraph and coming where they do as supplementary to the alteration in the names of the persons who were appointed executors.

The result altogether to my mind is that I have very serious doubt whether the testator ever intended to change the

disposition of the one-third of the residue which he had given to Bowyer Nichols. That being so, upon the whole I think this is a case for the legitimate application of the settled, well-established, and sound principle which was discussed by more than one of the Lords in the case of *Randfield* v. *Randfield* (1), and which was applied by the Court of Appeal in *In re Percival* (2); and I observe that this rule has been applied not only when the question was one merely of the revocation of the legacy —that is, a question between the legatee and the residue—but it has been applied in *Hearle* v. *Hicks* (3) as between one devisee and another person who claimed to be devisee under the same will. Therefore my conclusion is, upon the whole, that there is so much doubt upon this codicil that I ought to apply the principle I have mentioned, and not take away from Bowyer Nichols the one-third of the residue which is clearly bequeathed to him by the will.

R. M.

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The defendant Freeman appealed. The appeal was heard on April 8, 1910.

Hughes, K.C., and *Byrne*, for the appellant. There is here a plain direction that the will is to take effect as if the name of Harry Freeman were substituted "throughout" for the name of Bowyer Nichols, and unless those words were intended to affect the gift of residue they could not affect anything. Express revocation is not necessary; the substitution of another person is sufficient. The direction itself being perfectly clear and unambiguous, it cannot be limited by the preceding recital which, though not incorrect so far as it goes, is incomplete: *Higgins* v. *Dawson*. (4) The word "throughout" means "from beginning to end." In *In re Percival* (2) the language was more restricted. The object of this direction was to cut out every possible interest of Nichols under the will, whether fiduciary or beneficial.

Cave, K.C., and *Luxmoore*, for the respondent, Nichols. Where there is a clear gift there must be an equally clear revocation: *Hearle* v. *Hicks*. (5) It is inconceivable that the gift of residue

(1) 8 H. L. C. 225.
(2) 59 L. T. 21.
(3) 1 Cl. & F. 20.
(4) [1902] A. C. 1.
(5) 1 Cl. & F. 24.

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should be revoked by general words such as these. Having regard to the framework of the codicil and especially to the recital, the general words refer only to clause 2 of the will. The words are not useless, but are needed to shew that Freeman and not Nichols is to act as trustee of the will. These general words are a recognized form, though not the most approved form, for substituting one person for another as executor—Hayes and Jarman's Concise Forms of Wills, 12th ed. p. 437—and the legacy which is revoked is a legacy given to Nichols for his trouble as executor. This case is covered by *In re Percival.* (1)

Hughes, K.C., in reply.

COZENS-HARDY M.R. This is an appeal from an order of Joyce J., who has declared that by the true construction of the will and codicil of the testator the defendant Bowyer Nichols is entitled to a third share of the residuary proceeds of the testator's estate which was by the said will given to him, and the question is whether that decision is right. In my opinion the decision is quite right. The will is not inartificially framed. It is what is called a lawyer's will and it is carefully drawn. By the second clause of the will the testator appointed Sir Theodore Hope, Bowyer Nichols, and Francis Ford Freeman to be the executors and trustees of his will and bequeathed to the said Bowyer Nichols if he should prove the will, and in addition to any other benefit to which he might be entitled under the will, the sum of 1000*l.* free of legacy duty. The subsequent clauses contain a number of legacies, one to Mrs. Bowyer Nichols, but none to Mr. Bowyer Nichols himself. Then we come to clause 6, which is the only other clause in which the name of Bowyer Nichols appears, and by that clause the testator gave all his estate and effects whatsoever and wheresoever as well real as personal to his trustees upon trust for sale and conversion with a power of postponement for such period as they should think proper, and upon trust to pay out of the proceeds his funeral and testamentary expenses and debts and the legacies thereinbefore bequeathed and the duties thereon, and to pay the residue of the same moneys unto and equally between Lady Duckworth,

(1) 59 L. T. 21.

Bowyer Nichols, and G. F. Leverson, of the Northumberland Fusiliers, or such of them as should survive him. There you have an appointment of Bowyer Nichols as one of three executors and trustees; you have a legacy of 1000*l.* given to him in consideration of his proving the will—a legacy which he could not get if he did not prove—and then you have a further benefit to Bowyer Nichols in the shape of a third of the residuary estate, which he would take whether he proved the will or whether he disclaimed altogether the trusts of the will. Then we come to a codicil made in the following year. The codicil is framed in paragraphs. By the first paragraph it gives a nurse, who had had a legacy under the will, a further legacy free of legacy duty. Then it goes on: "Secondly by my said will I have appointed Bowyer Nichols Esq. to be one of the executors thereof and I have given him a legacy of 1000*l.* for his trouble in acting as such executor"—that is to say, in addition to any other benefit he would take—"Now I hereby revoke the appointment of the said Bowyer Nichols as such executor and also the said legacy of 1000*l.* given to him as aforesaid." That refers to clause 2 of the will and only to clause 2 down to that point. Then the codicil goes on, without any separate paragraph or sub-division, "And I appoint Harry Freeman to be an executor of my said will in the place of the said Bowyer Nichols and give to the said Harry Freeman a legacy of 200*l.* free of legacy duty for his trouble in acting as such executor And I declare that my said will shall be construed and take effect as if the name of the said Harry Freeman were inserted in my said will throughout instead of the name of the said Bowyer Nichols and in all other respects I confirm my said will." The question is whether these last words near the end of the codicil amount to a revocation of the beneficial interest which Bowyer Nichols takes under clause 6 of the will in one-third of the residue or whether they are simply incidental to and consequential upon and involved in the carrying out of the testator's intention of substituting Harry Freeman for Bowyer Nichols. In my opinion the latter is the true view. When the testator intended to revoke a benefit he did it in proper terms and did it expressly—"I revoke the legacy"—and to say that these last words, which are apt and appropriate and in all respects suitable in dealing

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with clause 2, must as a matter of necessity be applied to clause 6 is to take a step which I am not prepared to take. Not only is there no express revocation, but you can only find it if you read these last words strictly and absolutely regardless of all the context in the codicil. You can only find it if you simply look at the will and in every place where you find the name Bowyer Nichols write the name of Freeman. I do not wish to make too much of the point, but if you were to do that strictly, that would give the legacy which was given to Mrs. Bowyer Nichols to Mrs. Freeman. That, of course, is too absurd. But I do not think it follows by any means so clearly that you ought not to say that Freeman gets a legacy of 1000*l.* in substitution of Nichols' legacy, although that I think cannot be right, because when one looks at the clause one sees as a matter of inevitable necessity that what the testator was doing was simply providing a complete change in clause 2 of the will. I see no reason for holding that the share of the residue, which is given in clause 6 with perfect clearness, can have any possible ambiguity, or that it can be cut down or destroyed except by an equally clear revocation in the codicil. No doubt there may be an implied revocation. You need not, I agree, have express words; but the absence of express words in this case is something which, though not conclusive, is not to be disregarded. Express words are used when the smaller benefit given to Bowyer Nichols is revoked, and I decline in this context and under all the circumstances of this case to say that there is a revocation of the gift of residue simply by the addition of these words, occurring where they do, "my said will shall be construed and take effect as if the name of the said Harry Freeman were inserted in my said will throughout instead of the name of the said Bowyer Nichols." In my view we ought to read those words as having reference only to the change in clause 2. That was the view of the learned judge, and without saying for one moment that the construction of the will and codicil is not open to some little difficulty, I personally think that the view taken by Joyce J. was quite right and that this appeal should be dismissed.

BUCKLEY L.J. When this case was opened I felt some doubt, but as the result of the discussion I feel none at all. The

decision is, I think, right. There are only two principles to be applied. The first principle is that which every Court of construction has to apply in every will case which comes before it. That is that it is the duty of the Court of construction to read the language of the testator and to ascertain his intention from the words he has used. On the one hand the Court must not vary his language, on the other hand it must not tie itself so strictly down to the literal meaning of the words as to give the go-by to the intention which is to be found expressed in the words. The second principle is that a clear gift in a will is not to be cut down by anything subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down. If there be a plain gift in a will the Court will not say it is defeated by something ambiguous in a codicil which does not plainly cut down the previous gift.

Before reading the language of the will the most salient observation, I think, is this. This testator had appointed Mr. Bowyer Nichols an executor and had given him two beneficial interests. One was a legacy of 1000*l.*, and the other was a right to one-third of the residue. In giving the legacy the testator used this language: "In addition to any other benefit to which he may be entitled under this my will I give him 1000*l.* free of legacy duty." By the codicil he expressly revokes the legacy of 1000*l.* and says nothing about the other beneficial interest, which in fact was much larger, the one-third of the residue. We are asked to say that his intention as indicated by this instrument was to take away the beneficial interest as to this one-third of the residue by certain general words. Of course if you read those words and find that they have that effect, well and good. But if you find those general words used in such a context as that you can give full effect to them without saying that the testator intended to take away the larger gift, that of the residue, by general words, when he had taken away the smaller gift, that of the legacy of 1000*l.*, by express words, I think you ought to do so.

Now the way in which the matter stands is this. Having appointed Bowyer Nichols executor, and given him the legacy of 1000*l.* for being executor, and given him a third of the residue,

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the testator makes a codicil, and he divides his codicil into two parts by words "Firstly" and "Secondly." With "Firstly" we have nothing to do; it is simply an increased legacy given to a nurse. "Secondly" commences with a recital. The testator says "By my will I have done something." Then follow three sentences. First he says "Now I revoke" that something, secondly he introduces a substituted appointment and gift, and lastly he says "And I declare." It is those last words of declaration that are the crucial words. His recital is that he has appointed Nichols executor and has given him a legacy of 1000*l.* for acting as executor. A plain subject-matter is here indicated, namely, the appointment to an office and the legacy given for acting in that office. He goes on with the word "Now," by way of introducing the substituted appointment and gift, and says in effect:—"Now I revoke the appointment of executor, I revoke the 1000*l.* legacy for being executor, I appoint Freeman executor in the place of Nichols, and I give Freeman 200*l.* for his trouble in acting as executor." Then come these words: "And I declare that my will shall be construed and take effect as if the name of the said Harry Freeman were inserted in my will throughout instead of the name of the said Bowyer Nichols." As matter of construction I hold that that sentence means "And for this purpose I declare that my will shall be construed." He uses the word "and" to couple the declaration with that which precedes. The declaration relates and relates only, I think, to that which precedes. It has been suggested that upon this construction the concluding words of the codicil are otiose, that they were not wanted. It is said that the name Bowyer Nichols was only mentioned three times in the will, namely, twice in clause 2, which was subsequently dealt with by the codicil, and again in clause 6, and that the declaration at the end of the codicil was not required except for the purpose of depriving Bowyer Nichols of his share of the residue under clause 6. I do not agree. Under clause 6 there was created a trusteeship which might last for years. There was an existing operative trusteeship. The words were wanted for the purpose of saying that not as executor only but as trustee also Freeman should be put in the room of Nichols. I can give full and entire effect to those words if I say

they were used for that purpose. As matter of construction I arrive without any hesitation at the conclusion that they were used for that purpose. The true meaning of the codicil is that, having taken in hand the particular subject-matter of the appointment of executor and the legacy to the executor, the testator made a variation as regards the person and a variation as regards the gratuity for the office, with a further direction that in all matters connected with that subject-matter, that is, the executorship and trusteeship, Freeman, not Nichols, should be the person to be named.

On these grounds I think that the direction did not extend to deprive Mr. Nichols of the beneficial interest which is given to him by clause 6, and that this appeal should be dismissed.

KENNEDY L.J. Inasmuch as the Master of the Rolls and Buckley L.J. have formed an opinion, which is also in agreement with the opinion of the judge below, upon the construction of this codicil I do not feel myself justified in dissenting; but I must say that I still feel very considerable doubt whether our decision is not perilously near infringing the rule that if you find a sentence in a document which has a natural meaning, and which, unless you give that meaning to it, might be left out altogether as superfluous, you are not at liberty, however much you may think it departs from the intention of the author of the instrument, to discard that sentence. I do not myself feel that the matter is free from doubt for reasons which I will shortly state. I asked the learned counsel for the respondent what force he gave to the words at the end of the codicil, and the only suggestion that he made was that they might cover the possibility of the powers and duties of a trustee being either asserted by or imposed upon Mr. Bowyer Nichols if those words had not been inserted. Another suggestion which has been put forward by Buckley L.J., and which I confess seems to me more reasonable, if one has to put forward a suggestion, is destructive of that view; namely, that you should read the words "for this purpose" before "I declare." Now this purpose, the foregoing purpose, has nothing to do with a trustee at all. The foregoing purpose was "Now I hereby revoke the appointment of the said

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Bowyer Nichols as such executor and also the said legacy of 1000*l.* given to him as aforesaid "—that is, as executor—" and I appoint Harry Freeman executor of my will." If you read into the declaration " and for this purpose " that would give a clear and sufficient meaning, and in view of the decision of the Court of Appeal in *In re Percival* (1), it may be legitimate to insert those words. But the contention of the respondent's counsel that the declaration was put in to deal with some question of either duty or power as trustee cannot stand with the suggestion of the foregoing purpose, which is the purpose of dealing with the appointment as executor and the legacy given to the executor as executor. It has been further suggested by counsel for the respondent that if the declaration were read literally the substitution of the name Harry Freeman for Bowyer Nichols might possibly apply to a part of the will to which it certainly was not intended to apply, namely, to the legacy to Mrs. Bowyer Nichols. That cannot be so, because the words are " the name of the said Bowyer Nichols " and the said Bowyer Nichols is described before as the person who was named in the will as executor. I confess I feel great difficulty after all the argument in saying that this clause can be explained merely as a reference to the trusteeship under the will and that it was put in ex majori cautela to prevent a difficulty arising after the change which was made by the earlier part of the codicil, and some difficulty in treating this as a clause which is intended to refer only to what preceded. But in the similar case of *In re Percival* (1), which was a decision of the Court of Appeal, that Court appears to have found no such difficulty. The words there were " in all respects," and I cannot, I confess, draw a clear distinction between " in all respects " and " throughout." Further, my brethren, who are much more versed in matters of construction in documents of this kind, are quite clear in their view, and I certainly should not be justified in dissenting.

Solicitors: *Mackrell, Maton, Godlee & Quincey, for Trewhitt, Clarke & Robson, Sunderland; Corbould, Rigby & Co.*

(1) 59 L. T. 21.

H. B. H.

C. A.
1910
April 8.

In re MASON.
MASON *v.* MASON.

[1909 M. 1759.]

Will—Construction—Gift of Income to Daughter until Marriage—Gift over on Marriage—Death of Daughter unmarried—Indefinite Gift of Income—Absolute Gift—Determinable Life Interest.

A testatrix directed the trustees of her will to pay the income of her residuary estate to her daughter until she should marry and after her marriage to pay to her thereout a legacy of 3000*l.* and divide the balance between all her (the testatrix's) sons surviving her:—

Held, (1.) that the interest of the daughter in the residue under the direction to pay her the income was for her life or until her marriage; (2.) that the gift over to the sons took effect on the death of the daughter unmarried.

Rishton v. *Cobb*, (1839) 5 My. & Cr. 145, distinguished.

APPEAL from a decision of Joyce J.

Charlotte Mason by her will, dated July 29, 1893, appointed her sons Percy Mason, Walter Mason, and Dan Mason executors and trustees of her will, and, after making a bequest of plate, jewellery, and furniture to her daughter Alice Mason absolutely, and bequeathing certain pecuniary legacies, she devised and bequeathed to her said daughter all her estate and interest in a hotel known as the Bell Inn, Guildford. The testatrix then devised and bequeathed all the residue of her real and personal estate to her trustees upon trust to sell and to pay thereout her funeral and testamentary expenses and debts and to invest the balance as therein mentioned, and she declared that "my trustees . . . . shall pay the income of the said trust premises unto my said daughter Alice Mason until she shall marry and after her marriage shall pay to her the legacy or sum of three thousand pounds free of legacy duty out of the said trust premises and then divide the balance thereof equally between all my sons surviving me."

The testatrix died on January 17, 1897, leaving her surviving her daughter Alice and six sons, one of whom, Ellis Tapley Mason, died intestate in June of the same year.

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The next of kin of Ellis Tapley Mason were his five brothers and his sister Alice Mason and the defendant Mrs. Jean Sturt, a sister by the half blood. Alice Mason died on January 6, 1908, having by her will, dated July 31, 1901, devised and bequeathed her residuary real and personal estate to her five surviving brothers in equal shares.

An originating summons was taken out by the trustees and executors of the will of Charlotte Mason against their two remaining brothers and Mrs. Sturt for the determination of the question whether the direction in the will of the testatrix to pay the income of the residuary estate to her daughter Alice Mason until she should marry was in the event that had happened of her dying unmarried an absolute gift or only a determinable life interest. Joyce J. held that he was bound by *Rishton* v. *Cobb* (1) to hold that this direction constituted an absolute gift of the residue to Alice.

The defendant Mrs. Sturt appealed.

St. John Clerke, for the appellant. Joyce J. considered that he was bound by *Rishton* v. *Cobb*. (1) Lord Cottenham there drew a distinction between a gift during widowhood and a gift to a lady while she remained single and unmarried, and in the latter case he held that the interest did not cease with her death, but could only be determined by the act of marriage. It is difficult to follow that distinction, and that case was much commented upon in *In re Boddington*. (2) *Rishton* v. *Cobb* (1) is distinguishable because there was not there any gift over on death or marriage. Here there is a gift over on the marriage, and, apart from authority, it cannot be doubted that the intention was that the sons should take if the daughter either married or died. *In re Howard* (3), where Farwell J. followed *Rishton* v. *Cobb* (1), is distinguishable on the same ground, because in that case also there was no gift over. Assuming that the daughter took a determinable life interest only, the gift over, though expressed to be on the marriage only, means upon the determination of the prior interest and takes effect on either

(1) 5 My. & Cr. 145. (2) (1884) 25 Ch. D. 685.
(3) [1901] 1 Ch. 412.

marriage or death: *Browne* v. *Hammond* (1); *Underhill* v. *Roden*. (2)

Attwater, for the respondents, the other defendants. In the event which happened there was here an unlimited gift of income so as to carry the corpus. This case is covered by *Rishton* v. *Cobb*. (3)

St. John Clerke in reply.

COZENS-HARDY M.R. This is a will which apart from authority would not, I think, have occasioned me much doubt or difficulty, but I am bound to say that, having regard to a decision of great weight, which has endured for a long time, and also having regard to some modern decisions, it is a will which is by no means easy to construe. The question is whether under this will the testatrix's daughter Alice, although she died without ever having been married, although she died a spinster, took the residue of the estate absolutely, or whether on her death it went between all the sons of the testatrix living at her own death. That depends upon the construction of a few words which I will read. In the earlier part of the will there were certain absolute gifts to, amongst others, Alice. They were absolute gifts in terms—gifts of jewellery and articles of that kind. Then comes the disposition of the residue. The trustees are to sell and convert and to invest in certain securities, and then come these words, which are the only material words: "I declare that my trustees shall pay the income of the said trust premises unto my said daughter Alice Mason until she shall marry and after her marriage shall pay to her the legacy or sum of three thousand pounds free of legacy duty out of the said trust premises and then divide the balance thereof equally between all my sons surviving me." As I have said, Alice died a spinster. One of the sons died in the interval between the death of the testatrix and the death of Alice, and Alice gave all her property to her surviving brothers. The question arises between the estate of the brother who died in that interval and the surviving brothers. It will be observed here that there is not in form an absolute indefinite gift of income

(1) (1858) John. 210. (2) (1876) 2 Ch. D. 494.
(3) 5 My. & Cr. 145.

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to Alice. In form it is limited up to a time. It is until she shall marry. It will also be observed that there is a gift over of the residue to the sons in the event of her marriage—a gift over of the residue, diminished only in that event by a capital gift of 3000*l.* to the daughter. The question of construction for us to determine is whether on the face of this will, having regard to that gift over, we are bound to say that by construction there is an absolute indefinite gift of income to Alice, and that the period which and which alone was to limit it has never happened and can never happen, and that therefore the gift over can never take effect. Joyce J. reluctantly came to the conclusion that he was unable to give effect to that which he conceived to be the intention of the testatrix. Upon the whole I have come to the conclusion that I am able to give effect to that intention. I cannot doubt what the intention of the testatrix was. The testatrix directs payment of the income of the trust premises to her daughter without any other limitation than these words "until she shall marry." These words have been discussed again and again. The great difficulty is Lord Cottenham's decision in *Rishton* v. *Cobb.* (1) There the Lord Chancellor was dealing with a sum of 2000*l.* given to trustees upon trust to authorize and empower Lady Fanny Campbell, widow of the late Major-General Sir Niel Campbell, to receive the dividends as they became due so long as she should continue single and unmarried. There was a gift over on alienation or attempted alienation, but no gift over in the event of her marriage. Lord Cottenham says this (2): "If, therefore, she had been single and unmarried, and had so remained, she would have been entitled to the dividends, without any limitation of time. Her interest would not have been determinable by her death, but (independently of the forfeiture upon alienation) only by her ceasing to be single and unmarried. This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow; but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest." Now, but for one passage in the judgment which I will come to

(1) 5 My. & Cr. 145. (2) 5 My. & Cr. 152.

in a moment, that last sentence seems exactly to fit this case, because here the trust is to pay the income to the daughter until she shall marry, and Lord Cottenham seems to have thought that under a gift in that form the act of marriage was required to determine the interest which otherwise was indefinite and therefore perpetual. Lord Cottenham goes on to point out that in that case there was no gift over upon marriage or upon death. Here there is a gift over on marriage, and that seems to make a distinction which is not merely a distinction in form, but is in my opinion quite sufficient to prevent that somewhat cryptic passage in Lord Cottenham's judgment from being binding upon us in the sense of being applicable in this case. *Rishton* v. *Cobb* (1) was much discussed by the Court of Appeal in *In re Boddington* (2), and Lord Selborne L.C., delivering the leading judgment, quite obviously did not like that decision. He referred, not to the entire passage which I have read, but only to the first part of it. He says: "I refer to what Lord Cottenham himself says, regarding, as he did, the annuity in that case as perpetual, and not for life only: 'This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow.'" He did not read, and, so far as I can gather, he did not in any way express his approval of the next sentence that "the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest." A similar point came before Farwell J. in *In re Howard*. (3) There there was no gift over—nothing whatever but a simple trust to pay the income to Amelia Howard so long as she remained unmarried. Farwell J. held that in the absence of a gift over the passage I have read from *Rishton* v. *Cobb* (1) ought to be followed, that he had no power to overrule it, and that the lady was therefore entitled absolutely. In the present case I think there is enough in the fact of the gift over to enable us to hold that the gift here is to be read as a gift to the daughter during her life or until marriage, and, that being so, I think that the gift over, although it is only expressed to be a gift over on her marriage, falls within the well-known rule of

(1) 5 My. & Cr. 145. (2) 25 Ch. D. 685, 689.
(3) [1901] 1 Ch. 412.

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Jones v. *Westcomb* (1) and takes effect either on the death or on the marriage of Alice—in the case of her marriage, subject to the deduction of the 3000*l.* legacy to her; in the case of her death, without any such deduction. On the whole, therefore, I think that the judgment of Joyce J. must be reversed and that this appeal must be allowed.

BUCKLEY L.J. The learned judge felt himself constrained by authority to hold that Alice Mason took an absolute interest. The question is whether that is right. Now Alice does not take an absolute interest unless there is an indefinite gift of income. Reading this will I cannot find that there is. There is a gift of income to Alice until a time, and after that time there is another gift, a gift of the corpus. The testatrix has divided the time into two periods, one until Alice marries, and the other after she marries. She disposes of the income during the first period and she disposes of the capital at the commencement of the second period. There is no indefinite gift of income. The principal difficulty arises from *Rishton* v. *Cobb.* (2) It would seem that if a lady be a widow her widowhood may determine in two events. It will determine if she marries; it will determine also—I have Lord Cottenham's authority for it—if she dies. I should have thought the same was true of spinsterhood. I should have thought that a spinster ceased to be a spinster when she married and ceased to be a spinster when she died. But it seems that Lord Cottenham finds a difference. I confess I cannot follow it. He says: "The state of widowhood must determine with the life of the widow; but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest." However that may be, *Rishton* v. *Cobb* (2) is distinguishable from this present case because there was there no gift over on marriage or death, but only a gift over on alienation. Here there is a gift over, and *Rishton* v. *Cobb* (2) does not necessarily govern this case. I end as I began by saying that I cannot find here an indefinite gift of income. Alice therefore cannot take an absolute interest, but takes only during her life or until her marriage. The gift over

(1) (1711) 1 Eq. C. Ab. 245.

(2) 5 My. & Cr. 145.

is on her marriage only, but according to well-settled principles that means after the determination of her prior interest. Therefore the gift over will take effect.

KENNEDY L.J. I agree and I have nothing to add.

Solicitor for all parties: *Bertram Sturt.*

H. B. H.

WILLÉ *v.* ST. JOHN.

[1908 W 816.]

Costs—Appeal—Order for Security—Poverty—Order for Leave to prosecute Appeal in forma pauperis—Effect of Pauper Order on Order for Security.

An order in the usual form requiring an appellant to give security for the costs of the appeal on the ground of poverty, and containing a stay of proceedings until security is given, ceases to operate if, within the time limited for giving security, the appellant obtains an order for leave to prosecute the appeal in forma pauperis.

THE plaintiff having lodged an appeal against a decision of Warrington J. (1), on January 18, 1910, the respondent Holmes obtained an order against the appellant for security for the costs of the appeal on the ground of the appellant's poverty, and on January 21, 1910, the remaining respondents obtained a similar order. Both orders were in the same form. The appellant was required to give security within fourteen days of the date of the order, and it was ordered that until such security should have been given all proceedings in the appeal should be stayed; and, further, that in default of the appellant giving security within the stipulated time the appeal should stand dismissed out of Court without any further order.

On January 25, 1910, the plaintiff obtained ex parte an order for leave to prosecute the appeal in forma pauperis.

On February 3 the appeal came on for hearing before the Master of the Rolls and Fletcher Moulton and Buckley L.JJ., and the preliminary objection was taken on behalf of the respondent

(1) Ante, pp. 84, 325.

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Holmes that the appellant had no locus standi as against him inasmuch as he had not given security within the stipulated time. The objection raised the question whether or not the order for security was superseded by the order admitting the appellant to prosecute his appeal in forma pauperis.

The Court directed the matter to stand over till the following day for argument before the full Court of Appeal. At this date the orders for security had not been drawn up.

Rowden, K.C., and *A. Adams*, for the respondent Holmes, in support of the preliminary objection. It is a preliminary objection to this appeal that the order for security has not been complied with, and that order has not been superseded by the order giving the appellant leave to prosecute the appeal in forma pauperis. It is not in accordance with the practice of the Court to make such an order after an order has been made for security for costs. It is now well settled that poverty is a good ground for requiring security for the costs of an appeal: *Harlock* v. *Ashberry*. (1) It is also settled that an order for leave to sue in forma pauperis is not retrospective and that it may be obtained at any stage of the proceedings—*Doe* v. *Owens* (2)—and that a party who sues or is sued in forma pauperis is entitled to appeal without any further order: *Drennan* v. *Andrew* (3); *Biggs* v. *Dagnall* (4); but there is no authority on the question at issue.

The order giving the appellant leave to prosecute his appeal in forma pauperis was irregularly obtained on two grounds. First, the order for security, which is in the usual modern form (Seton on Judgments, 6th ed. p. 873), contains a stay of proceedings until security is given, and the application to appeal in forma pauperis was a proceeding in the appeal. Secondly, when the order for security was made it was the duty of the appellant to give some indication of his intention to appeal in forma pauperis, and, not having done so, he cannot afterwards apply to the Court in the respondents' absence for a pauper order, which must necessarily have a prejudicial effect on their order for security. He is

(1) (1881) 19 Ch. D. 84.
(2) (1842) 10 M. & W. 514.
(3) (1866) L. R. 1 Ch. 300.
(4) [1895] 1 Q. B. 207.

disqualified from getting the order by the fact that an order for security on the ground of poverty had been made against him in his presence without any reservation of his right to apply for an order to appeal in forma pauperis.

The orders for security not having been drawn up, the Court has jurisdiction to modify them, but it is submitted in the circumstances that they ought not to be altered.

P. S. Stokes, for the remaining respondents.

Francis Watt, for the appellant. The right of appealing in forma pauperis is not subject to the limitation of giving security for costs—*Biggs* v. *Dagnall* (1)—and if an order for leave to appeal in forma pauperis is made after an order for security has been obtained, but within the time limited for giving the security, that order supersedes the order for security.

[BUCKLEY L.J. The proper course was for the appellant to say that he intended to apply for leave to appeal in forma pauperis at the time when the application for security was made.]

The appellant was entitled to see whether the order for security would be made and to have time to consider his position. It is said that the pauper order was made behind the back of the respondents, but the regular practice is to apply for these orders ex parte, and such orders always affect the other side prejudicially, and none the more because an order for security has been obtained.

The COURT (Cozens-Hardy M.R., Vaughan Williams, Fletcher Moulton, Farwell, and Buckley L.JJ.) held that, as the orders for security had not been passed and entered, it was competent to the Court, having regard to the circumstances which had since come to its knowledge, to modify the orders. The Court accordingly varied the orders by making no order upon the motions for security, except that the costs of the motions should be costs in the appeal, and reserved judgment upon the general question.

April 22. COZENS-HARDY M.R. On February 4 we dealt with the facts of this particular case, but it seems desirable to make some general observations with reference to pauper appellants

(1) [1895] 1 Q. B. 207.

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and security for costs. I start with the proposition, established centuries ago by statute and since developed by judicial decisions and now embodied in rules, that a person disabled by poverty is entitled to assert or defend his assumed rights without the liability to pay costs. The standard of poverty conferring this privilege of suing in forma pauperis has varied from time to time. At present it is fixed by Order XVI., r. 22. The applicant must prove that he is not worth 25*l.*, his wearing apparel and the subject-matter of the cause or matter only excepted. For the protection of the opposite litigant against the abuse of the privilege the applicant must not only satisfy the Court of this, but produce counsel's opinion that he has reasonable grounds for proceeding. On such an application, which is ex parte, the Court has a discretion to grant or refuse the application: see *M'Cabe* v. *Bank of Ireland.* (1) If the order is made, notice has to be given to the opponent, and the order takes effect only from the date of service: *Fray* v. *Voules.* (2) It does not relieve the pauper from liability to pay antecedent costs. The opponent may apply to "dispauper" not only on the ground of means, but also on the ground of vexation or misconduct by the pauper in the cause: see Lord Eldon's judgment in *Corbett* v. *Corbett.* (3) But unless such an application succeeds the pauper is freed from all liability to pay future costs. If an impecunious litigant who has not obtained an order to sue in forma pauperis appeals, the respondent ought, under ordinary circumstances, according to the rule laid down in *The Constantine* (4), to ask the appellant by letter to give security. If the appellant does not answer the letter by saying that he is prepared to give security or by saying that he intends to apply for a pauper order the respondent may apply for security for costs. An order ought not to be made if substantially all the costs of the appeal have been previously incurred, although when the order is made the security extends to past and future costs alike. When the appellant is asked by letter to give security and intends to appeal as a pauper, he ought at once to inform the respondent that he proposes to

(1) (1889) 14 App. Cas. 413.
(2) (1868) L. R. 3 Q. B. 214.
(3) (1810) 16 Ves. 407.
(4) (1879) 4 P. D. 156.

apply for a pauper order, and the application for security for costs should not be made. But the omission to give such information does not deprive the pauper of his right. If, however, the application for security for costs is made, and an order is obtained in the modern form, one of two things may happen. If the ten or fourteen days named in the order have elapsed before any step is taken by the appellant the appeal is dismissed and the matter is ended. If, however, before the expiration of the ten or fourteen days the appellant obtains a pauper order a change of circumstances has arisen, and the Court is bound not to allow the rights of the pauper to be defeated by reason of the form of the order for security. It is inherent in every such order that circumstances may arise which would render it unjust for the Court to allow the order to operate according to its terms. If the appellant were to die or become of unsound mind in the interval this would not be disputed, and I think the fact, established to the satisfaction of the Court, that the appellant is a pauper and has a reasonable case to submit to the Court of Appeal ought to have at least as great effect. The respondent who obtains an order for security must be taken to know that it may cease to be operative if the appellant in the interval obtains a pauper order. It is unnecessary to observe that there are many impecunious appellants whose means are such that they cannot become pauper appellants, and my observations have no application to such cases.

VAUGHAN WILLIAMS L.J. I concur in the observations of the Master of the Rolls. I cannot call it a judgment, for it is not a judgment. I have had some hesitation in concurring, because I have had some doubt whether that which is laid down in the observations ought not to have been made the subject of a rule by the Rule Committee. I understand, however, that the observations are rather a consolidation of past decisions than any new rule, and I understand that these observations are not intended in any degree to qualify the rights of those who apply to litigate in forma pauperis according to the present practice, and I understand also that the present observations make no change as to the necessity for those who apply for security for

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costs in the Court of Appeal to give evidence as to the insolvency of the appellant.

FLETCHER MOULTON, FARWELL, and BUCKLEY L.JJ. concurred.

Solicitors: *Clowes, Hickley & Steward; Fooks, Chadwick, Arnold & Chadwick; Webster & Webster.*

H. B. H.

C. A. 1910 *March* 15, 16.

LORD ELCHO *v.* ANDREWS.

[1909 W. 1081.]

Advowson—Union of Benefices—Single Patron—Act of Union—No Provision for alternate Presentation—Order of Exchange—Grant of old Advowson—Construction.

By an act of union or deed of consolidation, dated in 1738, the rectory and parish of P. were incorporated with the vicarage and church of D. to all intents and purposes in law whatsoever, constituting and appointing the church of D. to be the mother church to which (together with the rectory of P.) all future incumbents should be promoted, instituted, and inducted. At the date of the union there was only one patron of the two benefices, and no provision was made by the deed for alternate presentation or otherwise. By an order of exchange made in 1890 by the Board of Agriculture under the Inclosure Acts, 1845 to 1878, and the Board of Agriculture Act, 1889, certain lands and hereditaments in the two parishes, including "the advowson of the vicarage of D.," were ordered to be exchanged:—

Held, affirming the decision of Neville J., that after the union the old advowsons ceased to exist, and that what passed by the order of exchange under the description of "the advowson of the vicarage of D." was the advowson of the new united benefice of D.-cum-P.

Robinson v. *Marquis of Bristol*, (1851) 11 C. B. 241, distinguished.

APPEAL from a decision of Neville J.

By an act of union or deed of consolidation dated March 28, 1738, and executed by the then Bishop of Gloucester, the rectory and parish of Pinnock was united to and incorporated with the vicarage and church of Didbrook with the chapelry of Hayles belonging to it, and the said parishes were thereby consolidated to all intents and purposes in law whatsoever, the church of Didbrook being constituted and appointed to be the mother church to which (together with the rectory of Pinnock and chapelry of

Hayles) all future incumbents should be presented, instituted, and inducted. At the date of the act of union Didbrook and Pinnock were two small parishes contiguous to one another in the county of Gloucester. The parish church of Pinnock had then for many years been demolished and in ruins, and there was no parsonage house for the rector to reside in. The act of union recited that the tithes, fruits, profits, and emoluments of the vicarage of Didbrook together with the chapelry of Hayles belonging to it were under the yearly value of 20*l.*, and that the tithes, fruits, profits, and emoluments of the rectory of Pinnock were of the yearly value of 30*l.*, and that they were both in the disposal and patronage of Viscount Tracy, who was desirous that both for the future should be under one and the same incumbent.

In 1872 the Rev. William Darke Stanton was instituted into "Didbrook vicarage with Pinnock rectory and Hayles chapel," and he was still the incumbent of the united benefice.

By an order of exchange dated August 28, 1890, being an order effecting an exchange of lands under the Inclosure Acts, 1845 to 1878, between the Earl of Wemyss and March and Lord Sudeley, the Board of Agriculture (in pursuance of the Board of Agriculture Act, 1889) ordered and declared (inter alia) that the lands and hereditaments then belonging to Lord Sudeley and specified in the second schedule thereto, together with the rights, easements, and appurtenances belonging to the said lands and hereditaments, should be taken by and thenceforward become and be the lands and hereditaments of the said Earl of Wemyss and March in exchange for other lands and hereditaments then belonging to him and specified in the first schedule thereto.

Amongst the property specified in the second schedule as taken by the Earl of Wemyss and March under the order of exchange were certain lands in the parishes of Didbrook, Hayles, and Pinnock and Hyde "together with the advowson of the vicarage of Didbrook."

At the date of the order of exchange the said Earl of Wemyss and March was entitled to his part of the lands and hereditaments included in the exchange as tenant for life under the will of the eighth earl, who died in 1883.

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By an indenture dated December 31, 1903, and made between the Earl of Wemyss and March of the one part and the plaintiff, Lord Elcho (being the next tenant for life in remainder of the estates dealt with by the said indenture), of the other part, the said earl surrendered to the plaintiff his life estate in all the manors, messuages, lands, tenements, advowsons, rectories, hereditaments, and real estate devised by the will of the eighth Earl of Wemyss and March except such parts thereof as had been disposed of, but including all other freehold hereditaments which by means of any conveyance, exchange, or otherwise had become subject to the limitations of the said will.

Prior to the order of exchange the advowson of the vicarage of Didbrook, the rectory of Pinnock and Hyde, and the chapelry of Hayles formed part of an estate called the Toddington estate, of which Lord Sudeley was tenant for life.

The defendant claimed to have acquired from Lord Sudeley the advowson or right of presentation to the rectory of Pinnock-cum-Hyde and the chapelry of Hayles, his contention being that notwithstanding the consolidation effected by the act of union of 1738 all that passed to the Earl of Wemyss and March by the order of exchange under the description of "the advowson of the vicarage of Didbrook" was the advowson or right of presentation to the old vicarage of Didbrook, and not the advowson or right of presentation to the united benefice of Didbrook, Pinnock, and Hayles.

Upon an originating summons taken out by the plaintiff for the determination of the question, Neville J. held that the expression "the advowson of the vicarage of Didbrook" contained in the order of exchange referred to the consolidated benefice and not to the benefice of Didbrook only.

Against this decision the defendant appealed.

Peterson, *K.C.*, and *Hansell*, for the appellant. The effect of the deed of consolidation of 1738 was to unite the two benefices into one, but it did not affect the advowsons, which still remained separate; the union of the benefices did not destroy the separate rights of presentation. It is clearly laid down in Gibson's Codex, p. 920, that "by the union of two churches no

change is made in the advowsons," and not only are all rights reserved to the patron or patrons, but the nature of the advowsons continues the same. It is also laid down in Watson's Clergyman's Law (4th ed., 1747), p. 185, that though the incumbency of one church is extinguished by the act of union, yet the patronage still remains in being. In *Robinson* v. *Marquis of Bristol* (1) it was held that by the act of union a new presentative benefice was created and that the patronage of this new benefice was vested in the owners of the former advowsons in turn, the advowsons remaining for this purpose unchanged in all their qualities and transmissible as before. The plaintiff and defendant each have an advowson and must therefore unite in the appointment to the new benefice if they cannot agree to take turns, or if they do not unite or agree, then, in six months, the right to appoint goes to the Ordinary. Neither of them can appoint to the new benefice without the other. *Reynoldson* v. *Blake* (2) shews that the right of presentation remained annexed to the old advowsons notwithstanding the deed of 1738, and by the order of exchange one only of these advowsons, that of the vicarage of Didbrook, passed, and the advowson of the rectory of Pinnock remained.

Jenkins, *K.C.*, and *Maugham*, for the respondent. What passed by the order of exchange under the description of "the advowson of the vicarage of Didbrook" was the right of presentation to the new united benefice of Didbrook-cum-Pinnock. The passage relied on in Gibson's Codex was dealing with a case in which an alternative right of presentation was reserved by the act of union; that is not this case, where the two advowsons were at the date of the act of union vested in the same owner.

The appellant's argument ignores the law as laid down in *Reynoldson* v. *Blake*. (3) The present benefice is not the ancient rectory and vicarage, but "novum aliquid tertium" composed of both; therefore it is a new advowson which was created and not the old which continued. *Robinson* v. *Marquis of Bristol* (1) is distinguishable. In that case there were alternative rights of

(1) 11 C. B. 241.

(2) (1697) 1 Ld. Raym. 192, 196.

(3) 1 Ld. Raym. 198, 199.

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presentation. The effect of an act of union under 22 Car. 2, c. 11, was considered in *Wilson* v. *Van Mildert* (1), in which three parish churches had been united, and they were held to be properly described as one new presentative benefice.

Peterson, K.C., in reply, referred to 4 Burn's Ecclesiastical Law, 9th ed. p. 45.

COZENS-HARDY M.R. This is an appeal from a decision of Neville J. in a case in which the appellant asks for a declaration that the plaintiff is entitled to the presentation of the vicarage of Didbrook only, and not to the presentation of the consolidated benefice of Didbrook together with Pinnock and Hayles. The question really turns upon two documents, and two documents only—one an act of union, dated 1738, and the other an order of exchange, dated 1890.

This is a case in which there were two benefices, one a rectory and the other a vicarage. They were both small; there was only one church, I think, in use at the time, and an order was made in 1738, which is called a deed of consolidation, which I must substantially read through. The deed recites that it has been represented to the bishop that the parishes of Didbrook and Pinnock in Gloucestershire are contiguous to each other; that the extent of the parishes and the number of parishioners are very small; that the income derived from the tithes and emoluments are also very small; that there is one patron of both, namely, Viscount Tracy (who was the sole patron of both livings), and that he is desirous that both in future should be under one and the same incumbent. The deed recites also that for many years the parish church of Pinnock has been demolished and is in ruins, and that there is no parsonage house for the rector to reside in there, and that the parish church of Didbrook is spacious enough to contain the congregation of both the parishes, and that all the parishioners of the parishes are desirous that the two parishes should be united and consolidated. It goes on to say that the patron and vicar of Didbrook and also the rector of Pinnock have signified that they are ready to consent to the union, and then it says that the bishop, after taking the due

(1) (1801) 2 Bos. & P. 394.

proceedings by virtue of his power and authority as Ordinary and according to the statutes in that behalf (referring to the statute of Henry VIII.), did "unite and incorporate the said rectory and parish of Pinnock with all and singular ye tithes fruits profits revenues oblations rights and emoluments whatsoever as well ecclesiastical and spiritual as temporal in any-wise belonging or appertaining thereto unto ye said vicarage and church of Didbrook with ye chappelry of Hayles belonging to it and to consolidate ye said parishes with ye said chappel to all intents and purposes in law whatsoever constituting and appointing ye church of Didbrook to be ye mother church to which (together with ye rectory of Pinnock and chappelry of Hayles) all future incumbents shall by ye same instruments be presented instituted and inducted." Then it goes on to make a number of other consequential directions, and it finally says, "We ordain decree and appoint that by virtue of ye power and authority of this our union and consolidation the future vicar of ye said parish church of Didbrook by virtue of his institution and induction to ye said church of Didbrook and his successors vicars thereof shall have take hold and receive all and singular ye fruits tithes profits revenues oblations and other rights and emoluments whatsoever belonging and appertaining to ye rectory of Pinnock." Now what was the effect of that? It will be observed that there was only one patron of the two. Of course there was no provision whatever made for alternate presentation or anything of that kind. For the patron to have said "There shall be alternate rights of presentation to me in turn, first in the character of patron of Didbrook and next in the character of patron of Pinnock," would have been ridiculous and absurd, and all the more when it is remembered that after this act of union there was no possibility of presenting any clergyman to the rectory of Pinnock or the vicarage of Didbrook, in the old sense in which those words were used, because after the act of consolidation there was beyond all doubt only one united benefice to which alone could any one be appointed, and in no full or proper sense of the word, as it seems to me, can it be said that after that union the old advowson of Pinnock or the old advowson of Didbrook had any existence at all. After considering all the

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authorities which have been submitted to us I am bound to say that I find no authority whatsoever to suggest that in any true sense of the word the old advowsons have any existence at all. The stress of the arguments really has turned upon a passage in Gibson's Codex and upon a judgment of the Exchequer Chamber in *Robinson* v. *Marquis of Bristol* (1), and I think it is expedient to examine those authorities with some care. Gibson's Codex, which is undoubtedly a book of great authority, says, under the head of "Rules of Canon and Common Law Concerning Unions" at p. 920, "By the union of two churches, no change is made in the advowsons. That is, not only all rights are reserved to the patron or patrons, as before, but the nature of the advowsons continues the same; as, if one be appendant, and the other in gross, and that which is appendant is made the presentative church, and the patron of the church in gross hath the first turn; yet shall not the whole advowson be in gross, but it shall remain appendant for his turn who was patron of the advowson appendant, and in gross for his turn who was patron of the advowson in gross." For that he cites Dyer, p. 259, which is the only authority in support of it. When the case in Dyer is looked at it will be found that it is a case relating to the parish of Illisfield in the county of Southampton. There were two parochial churches, one called the church of St. Martin and the other the church of All Saints. The advowson of the first church, the church of St. Martin, was appendant to the manor of Illisfield, and the advowson of the other church was an advowson in gross. "There were several patrons of them, and both the churches being void, the church of All Saints was united, annexed and consolidated to the other church by the assent of the Ordinary and of the patrons; and upon the said union it was ordained by the Ordinary with the assent of the patrons, that the patrons, their heirs and assigns, should present to the said church of St. Martin's alternately for ever, and that the patron of the church of All Saints should have the first turn, which then was void, which was executed accordingly." It therefore was apparent on the face of the act of union that the several patrons A. and B. who had rights of patronage were to have alternate

(1) 11 C. B. 241.

rights of patronage to the new benefice united by the document in question, and the only point which really arose then was how that was to be carried out. The Court held that, as the act of union had said that these patrons should have alternate rights of presentation, effect must be given to that by holding that the alternate right was to be exercised by a person who would, if there had been no act of union, have been entitled as owner of the old advowson which really had ceased to exist. That is the only authority for that proposition in Gibson's Codex, and it seems to me that is absolutely no authority whatever in a case where you have not two patrons, but one, and where, of course, you have no provision made for alternate patronage or any reference whatever to anything which should be done in future by persons interested in the old advowsons which are operated upon by the act of union. Then we come to the case of *Robinson* v. *Marquis of Bristol* (1), which counsel for the appellant most naturally and properly relied upon, and which is, I think, the basis of their whole argument. But there again I am unable to see that it helps them. There too was an act of union which expressly provided for alternate rights of presentation. I do not read the clauses of the deed, but that is apparent on the face of the deed. The only question which was decided in *Robinson* v. *Marquis of Bristol* (1) was this: "The declaration was in Quare Impedit, and stated that Samuel Hazlewood was seised of a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, as in gross by itself, as of fee and right, and was entitled to present to the same every alternate turn, viz., one turn in every two turns, the other moiety of the said advowson, and the other of the said two turns belonging to Frederick William Earl of Bristol as in gross." And further on it is stated that "The Marquis of Bristol pleaded that Samuel Hazlewood was not seised of a moiety of the said advowson of the church of Brauncewell-with-Dunsby-and-Anwick, in manner and form as the plaintiffs had alleged," and it was in proof of this plea alone that the question turned. That is to be found at p. 246, and it is again stated at p. 253. Now the title of Hazlewood turns solely upon the deed

(1) 11 C. B. 241, 245.

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of 1760, which is stated at p. 249, and by that deed Gardiner conveyed to Hazlewood in fee the manor and impropriate rectory of Anwick, which was one of two consolidated benefices, "and perpetual advowson, donation, or alternate right of presentation of the vicarage of Anwick, and disposition of and to the glebe lands &c. belonging thereto." The special verdict found that the title of Hazlewood to the moiety of the united or consolidated benefice was derived through that conveyance, if there were no other title, and the Court in that case decided that the alternate presentation which was reserved by the act of union, and which passed in terms by that deed of 1760, was "inseparably annexed to the advowson of the old vicarage, which, for this purpose, remains"—but only for this purpose—"and is transmissible as before." The report goes on: "Now, we think this is clearly made out by the conveyance of the 23rd December, 1760, by which Robert Gardiner's representatives, who had the advowson of the vicarage of Anwick in gross by itself, as of fee and right, have expressly conveyed that vicarage to Samuel Hazlewood in like manner." But that is no authority whatever for the proposition that in the absence of any reservation of a right, alternate or otherwise, after the act of union the old advowson exists for all purposes as something which of itself and apart from the instrument of union or consolidation confers the right of presentation. The Exchequer Chamber in *Robinson* v. *Marquis of Bristol* (1), after citing Gibson's Codex and *Reynoldson* v. *Blake* (2), said that they did not think there was any inconsistency, but they said this (3): "All this, we think, can well stand together, by our holding that the law is, in truth, that, by virtue of the act of union, a new presentative benefice is created, wholly separate and distinct from the former benefices; and that the patronage of the new presentative benefice is given, according as it is provided in the act of union itself, to the owners of the former advowsons in turn,—which advowsons, however, for this purpose remain unchanged in all their qualities." They are in fact a sort of advowson after the act of union, but they are not for any other

(1) 11 C. B. 241.

(2) 1 Ld. Raym. 192.

(3) 11 C. B. 251.

purpose to be considered as advowsons carrying any other right than such as is expressly reserved by the act of union.

In the present case it seems to me there is no foundation for the application of the principles which were there adopted. In the first place, as I have said, there are not two patrons, but only one; and in the next place there is no provision whatever for alternate presentation, because there could not be. But I wish to go further and to say that it seems to me in truth and in fact the appellant's claim is really negatived—I would almost say expressly, but certainly by necessary implication—by the act of union itself. It seems to me impossible to hold, on the fair reading of that, that there was any intention whatever to reserve any right at all to the patron of the old advowson of Pinnock, or to do anything else than to say that the rector of Didbrook for the time being is to be for ever after rector of Didbrook-cum-Pinnock, and that the person who appoints to this new consolidated living is the person who is to appoint according to the terms of the act of union. But, if there be any doubt about that, what is the meaning of the order of exchange? The order of exchange is dated 1890, and at that time Lord Sudeley was the patron of the united living. There had been no severance whatever, if severance were possible, between the rectory of old Pinnock and the vicarage of old Didbrook, and by the order of exchange, which dealt with considerable properties, there passed to Lord Elcho certain properties in various parishes, including Pinnock, together with the advowson of the vicarage of Didbrook. Now did anything at all pass under that? It is impossible to doubt that something passed. Then what did pass? There was no such thing as an old vicarage of Didbrook. Such a thing did not exist—it had gone. There was a new united tertium quid—a united benefice quite distinct and apart from the vicarage of Didbrook. Didbrook is the mother church and in fact is the only church, and without considering the question whether it is strictly accurate to say, according to what we find in *Reynoldson* v. *Blake* (1), that there is only one advowson proper after this date, at least this much is clear, that if in the deed of exchange the words had been "together with the advowson of the vicarage of

(1) 1 Ld. Raym. 192.

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Didbrook-cum-Pinnock" everything would have passed. That being so, it seems to me that there is in this case under this deed of exchange a sufficiently ample description to enable the Court to say that the whole united benefice of Didbrook-cum-Pinnock passed under this order of exchange, and that the plaintiff's title, which has been affirmed by Neville J., stands.

I have not read again any part of the judgment of Neville J., but I only desire to say that I entirely agree with it and adopt the views which he expressed and the grounds on which he based his judgment.

In my opinion the appeal fails and must be dismissed with costs.

BUCKLEY L.J. The authorities with which we have to deal are not, I think, difficult to understand and apply if there be steadily borne in mind the peculiar subject-matter with which we are concerned. The subject-matter is an advowson, a perpetual right of presentation to an ecclesiastical benefice. It is a property of this peculiar kind, that it is capable of being held by two owners in such a way as that each shall at a particular moment be entitled to the exclusion of the other. Upon the alternate voidance of the benefice, the one, to the exclusion of the other, may have the alternate right of presentation. That is the property with which we have to deal.

The authorities are two. One is *Reynoldson* v. *Blake*. (1) The first point to notice in that case is that of the two benefices which were there consolidated, St. Andrew's Wardrobe and St. Anne, Blackfriars, "Sir Thomas Gage was seised in fee of the rectory impropriate, to which the vicarage of St. Anne, Blackfriars, ad tunc pertinebat," and the principal matter of discussion in the case was whether the appendancy continued after the thing itself had in a sense by the union been destroyed, whether there remained appendant to the rectory which was vested in Sir Thomas Gage a right of presentation not to but in respect of that which had been the separate vicarage of St. Anne, Blackfriars. It was affirmed that appendancy still continued. I read on p. 195 this: "And as to the second point, Powell J. was of

(1) 1 Ld. Raym. 192.

opinion that the appendancy was not destroyed, but that the right of presentation every second turn to the new church became appendant to the rectory, as the vicarage was before." Again at p. 198: "And though the advowson be destroyed by the union, yet when it is severed in turns, each turn becomes appendant still, because it is done by act in law, which does not alter the nature of the thing."

The decision was not that after the consolidation there remained in existence an advowson of St. Anne, Blackfriars, but that an alternate right of presentation to the new consolidated benefice was vested in the person who had been theretofore the owner of the advowson of St. Anne, Blackfriars. The decision in brief was as to title to present in respect of the new advowson, not as to any right of presentation by reason of any continued existence of the old advowson. The other point decided in *Reynoldson* v. *Blake* (1), as I read it, is this: that where you have the advowson of St. Andrew's Wardrobe and the advowson of St. Anne, Blackfriars, and those two benefices are united and form a new benefice, there exist no longer an advowson of St. Andrew's Wardrobe and an advowson of St. Anne, Blackfriars; there can be no presentation thereafter to either one of those two benefices, for the simple reason that there is no such benefice. There is a novum aliquid tertium composed of both. What emerges after the union is a new benefice of St. Andrew's Wardrobe-cum-St. Anne, Blackfriars; and there is a new advowson, which is the right to present a person to that new ecclesiastical benefice. That I think is quite plain in the first place from several matters which are dealt with on p. 196, e.g., where it is said that a union is "generally made in time of vacancy of the church, for if the church was full, the act of the Ordinary could not prejudice the incumbent, for by the union the incumbency would be destroyed." Then, further, after pointing out that after the union there was only one new benefice "novum aliquid tertium," it is said, "If there is but one benefice the other is perfectly extinct." The two original benefices are gone, and there has arisen from their ashes a new benefice, the united benefice. Further down: "The

(1) 1 Ld. Raym. 192.

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advowson . . . . is but the right of presenting an incumbent to the church or benefice; then if there is after the union but one church and one benefice (as is proved before), then there could be but one advowson, and that is of the church to which the union is made." Perhaps too much stress must not be placed upon those last words, but when I come presently to the act of union I think it will be seen that they have some relevance. Then at the foot of p. 197: "Though in case of united churches there is but one advowson in right, yet every patron has the whole advowson to his turn; but the writ of right must be according to the right." On p. 199 that is followed up by pointing out that there is created this novum aliquid tertium: "So that this church is not the ancient rectory nor vicarage, but novum aliquid tertium composed of both." Then further down, "The patronages of the distinct parishes were annihilated, and a new advowson created, which should go every second turn to the several former patrons, which is a new advowson in gross." So much for the case of *Reynoldson* v. *Blake*. (1)

That case was applied in *Robinson* v. *Marquis of Bristol* (2), where the facts were that one Gardiner was seised in fee of the advowson of the vicarage of Anwick, and the Earl of Bristol was seised in fee of the advowson of the rectory of Brauncewell-with-Dunsby. By a deed dated March, 1703, it was recited that the parties were desirous that one clerk should be appointed to the benefice, and each patron was to appoint in his turn. Effect was given to that by an act of union of 1718: the one was consolidated with the other, and it was thereby decreed "that one fit person, at the alternate presentation of the Earl of Bristol and Robert Gardiner, their heirs and assigns . . . . should at all times thereafter possess the same." What subsequently took place was that Gardiner, or his successor in title, conveyed to the plaintiff, and the plaintiff asserted, by virtue of that conveyance, that he had acquired a right to an alternate presentation with the person deriving title from the Marquis of Bristol to the novum aliquid tertium. The law as stated in the case is best found, I think, in the passage at the foot of p. 251: "The law is, in truth, that, by virtue of the act of union, a new

(1) 1 Ld. Raym. 192. (2) 11 C. B. 241.

presentative benefice is created, wholly separate and distinct from the former benefices; and that the patronage of the new presentative benefice is given, according as it is provided in the act of union itself, to the owners of the former advowsons in turn,—which advowsons, however, for this purpose remain unchanged in all their qualities, and are to be conveyed as before, and with that conveyance carry the patronage of the respective turns to the whole newly-created presentative benefice." The emphatic words there are "*for this purpose.*" The old advowsons *for this purpose* remain unchanged and are to be conveyed as before. For the purpose of transmission the old advowson which no longer exists in the form of a right of presentation to the old benefice exists still for the purpose of devolution so as to pass the right to present alternately to the new benefice. "The right to this alternate presentation is inseparably annexed to the advowson of the old vicarage, which, for this purpose, remains, and is transmissible as before." (1) It is "for this purpose" and so as to be "transmissible as before" that the advowson of the old vicarage survives. For no other purpose has it a continued existence.

That is the law we have to apply. The facts with which we have to deal are that in 1738 the same person, Viscount Tracy, was entitled to the presentation to both the vicarage of Didbrook and the rectory of Pinnock—the patronage of the two benefices was in the same hand. By the act of union or deed of consolidation what was provided was that, with the consent of the patron of both and of the incumbent of both, Pinnock should be annexed and united to Didbrook. That appears by way of recital, and then the operative part of the deed is that Pinnock is united to and incorporated with the vicarage of Didbrook, with the chapelry of Hayles, Didbrook being appointed to be the mother church to which "together with ye rectory of Pinnock and chappelry of Hayles" all future incumbents should be presented. There is to be a presentation to the mother church of Didbrook, in which is merged by this deed the rectory of Pinnock and the chapelry of Hayles. If there should be any contest of seniority as between the two churches, it is Didbrook which

(1) 11 C. B. 253.

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is, so to speak, the paramount church, or what is called in *Reynoldson* v. *Blake* (1) "the church to which the union is made." Pinnock is incorporated with Didbrook, and the future vicar of Didbrook, by virtue of his institution and induction to the church of Didbrook, is to have, take, hold, and receive all and singular the emoluments, and so on, of Pinnock. That is the deed: what is the effect of it? It is that, at that date the patronage of the two benefices being in one hand, there is to be thereafter only one person appointed in respect of the united benefice of Didbrook-cum-Pinnock, and that is to be the person who is appointed vicar of Didbrook. What did happen afterwards was that in August, 1890, there was a grant to the plaintiff of the advowson of the vicarage of Didbrook. It seems to me that that either passed all or nothing. What is contended is that the result of that was to sever again these two advowsons, that the advowson of Didbrook went one way and the advowson of Pinnock went another, and thereafter no one could appoint at all to the united benefice except by the concurrence of both patrons. That seems to me an impossible construction. The grantor of the deed of 1890 had the right to pass to the grantee the right of appointing to the new benefice, and he had no other right. He did grant something to that grantee, and I think what he granted was that which resided in him, namely, the right which after the consolidation of 1738 existed of appointing to the united benefices of Didbrook and Pinnock.

For those reasons I think the order appealed from is quite right, and the appeal should be dismissed with costs.

JOYCE J. I assume in this case that the several provisions of the deed of consolidation were authorized by the statute, as indeed I think Mr. Hansell was good enough to admit, and so far as I can make out is the fact, looking at the Act. In 1890 an order of exchange was made, one of the subjects thereof being something designated as the advowson of the vicarage of Didbrook, which was among the property taken by the order of exchange from Lord Sudeley or the Tracy family and given to the Earl of Wemyss. Now, what is the meaning of this

(1) 1 Ld. Raym. 192.

expression, "the advowson of the vicarage of Didbrook," looking at such facts and surrounding circumstances as are properly admissible in evidence upon the consideration of such a question? The appellants contend that the order of exchange severed, in a sense, the advowson and the united benefice, resuscitating and leaving in Lord Sudeley or the Tracy family the advowson of the ancient rectory of Pinnock. I must say that I doubt whether, after the union effected by the deed of consolidation, the ancient rectory of Pinnock, properly so called, as distinguished from the vicarage of Didbrook, continued to exist. I think that the only advowson which the union continued was that of the united benefice. What we have to decide is the construction of the order of exchange, and we are asked to hold that the patron, being entitled to the whole of the united benefice, would, upon granting the advowson of the vicarage of Didbrook, retain, as a separate property, the ancient rectory of Pinnock. Having regard to the terms of the deed of consolidation and the state of circumstances existing at the date of the exchange, when Lord Sudeley was the owner of the advowson of the united benefice, I think that in a grant by deed made by him, or such an order of exchange as we have to consider, "the advowson of the vicarage of Didbrook" was a sufficient if technically imperfect description of the advowson of the united benefice, and that such advowson passed just as if "the advowson of the vicarage of Didbrook" were merely a compendious name for the advowson of the new united benefice. That is the opinion I have formed according to the best of my ability, and I am not aware that any of the authorities which have been cited compel me to decide anything to the contrary. Therefore I am of opinion that this appeal ought to be dismissed.

Solicitors for appellant: *Young, Jackson, Beard & King.*
Solicitors for respondent: *Meynell & Pemberton.*

G. A. S.

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March 19, 21, 22, 23.

RICKARD *v.* GRAHAM.

[1909 R. 964.]

Statute—Construction—Mischief—Purview—Ecclesiastical Law—Residence of Parsons on Benefices—Lease of Rectory—Omission of statutory "condition for avoiding the same" on Bishop ordering Personal Residence—Void or voidable—Pluralities Act, 1838 (1 *& 2 Vict. c.* 106), *s.* 59.

With the object of enforcing the residence of parsons on their benefices, if required by the bishop, s. 59 of the Pluralities Act, 1838, provides that "Any agreement made for the letting of the house of residence . . . . belonging to any benefice, to which house of residence any spiritual person may be required, by order of the bishop as aforesaid, to proceed and to reside therein . . . . shall be made in writing, and shall contain a condition for avoiding the same, upon a copy of such order . . . . being served upon the occupier thereof, or left at the house, and otherwise shall be null and void."

The section then provides for the service of the order and imposes a penalty of 40*s.* a day on any person holding over after service. After enabling "the spiritual person so directed to reside" to obtain possession by summary proceedings before a justice of the peace, the section proceeds: "Provided that any person who shall have been in possession of any such house of residence . . . . under a verbal agreement only, or under any agreement in which the condition aforesaid for avoiding the same shall not be inserted, and who shall be turned out of possession by virtue of this Act, shall be entitled to sue the person with whom he . . . . had entered into such agreement for damages occasioned by his . . . . being so turned out of possession, to be recovered in any of Her Majesty's superior Courts at Westminster":—

Held, that a lease of a rectory for the term of the rector's incumbency, though not containing the statutory condition of avoidance, was not absolutely void, but was good as between the rector and the lessee, and would only become void on the bishop ordering personal residence.

Held, also, that the object of s. 59 in requiring the insertion of the condition of avoidance was to bring the provisions of the law to the attention of the lessee, and the only effect of omitting it was to render the lessor liable in damages under the proviso if the lessee was turned out by reason of the bishop's order.

WITNESS ACTION.

By a lease dated August 22, 1908, the defendant, the rector of Great Bromley, Essex, demised Great Bromley Rectory to the plaintiff from August 14, 1908, for the term of the defendant's

incumbency at a rent of 90*l*. a year payable on the usual quarter days.

The defendant covenanted (inter alia) to maintain and keep the roof in good and tenantable repair and condition and to forthwith execute certain specified repairs, including any necessary repairs of the roof.

The plaintiff went into possession in August, 1908, shortly before the formal lease was executed. The roof was in fact in a very bad condition. The defendant did small repairs from time to time, but, owing to his delay in putting it into thorough repair, water frequently came in, and the plaintiff suffered discomfort and damage. In these circumstances the plaintiff quitted the premises on January 16, 1909, while the roof was still defective.

On June 28, 1909, the plaintiff brought this action for a declaration that the lease was void under s. 59 of the Pluralities Act, 1838, as it did not contain the condition of avoidance required by that section. In the alternative he asked for damages for the breach of the covenant to repair.

The defendant, who had in the meantime put the roof into thorough repair, contended that the lease was valid and denied that he had broken his covenants or that the plaintiff had suffered damage. He counterclaimed for the rent due at Lady Day, Midsummer, and Michaelmas, 1909, and for certain other small sums alleged to be due to him.

At the date of the lease the defendant had no licence to reside out of the rectory, a previous temporary licence having expired and not having been renewed.

The Pluralities Act, 1838, one of the objects of which was "to make further provision for enforcing the residence of spiritual persons upon their benefices," provides as follows:

Sect. 59. "And be it enacted, that any agreement made for the letting of the house of residence, or the buildings, gardens, orchards, or appurtenances necessary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person may be required, by order of the bishop as aforesaid, to proceed and to reside therein, or which may be assigned or appointed as a residence to any curate by the bishop, shall be made in writing, and shall contain

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a condition for avoiding the same, upon a copy of such order, assignment, or appointment being served upon the occupier thereof, or left at the house, and otherwise shall be null and void; and a copy of every such order, assignment, or appointment shall immediately on the issuing thereof be transmitted to one of the churchwardens of the parish, or such other person as the bishop shall think fit, and be by him forthwith served on the occupier of such house of residence, or left at the same; and any person continuing to hold any such house of residence, or any such building, garden, orchard, or appurtenances, after the day on which such spiritual person shall be directed by such order to reside in such house of residence, or which shall be specified in any such order, assignment, or appointment, and after such copy shall be so served or left as aforesaid, shall forfeit the sum of forty shillings for every day he shall, without the permission of the bishop in writing under his hand for that purpose obtained, wilfully continue to hold any such house, building, garden, orchard, or appurtenances, together with the expense of serving or leaving such order, assignment, or appointment, to be allowed by the bishop issuing the order or making such assignment or appointment; and it shall also be lawful for the spiritual person so directed to reside, or the curate to whom any such residence is assigned, to apply to any justice of the peace having jurisdiction in the place for a warrant for the taking possession thereof; and the justice to whom any such order for such possession is produced shall and he is hereby required, upon its being duly verified, to grant a warrant to some peace officer to deliver such possession, and possession may thereupon be taken of such house under such warrant at any time in the daytime, by entering the same by force, if necessary, without any other proceeding by ejectment or otherwise, any law or statute to the contrary notwithstanding; provided that any person who shall have been in possession of any such house of residence or premises under a verbal agreement only, or under any agreement in which the condition aforesaid for avoiding the same shall not be inserted, and who shall be turned out of possession by virtue of this Act, shall be entitled to sue the person with whom he or she had entered into

such agreement for damages occasioned by his or her being so turned out of possession, to be recovered in any of Her Majesty's superior Courts at Westminster."

The arguments and judgment on the above section are alone reported.

Hon. E. C. Macnaghten, K.C., and *Carden Noad*, for the plaintiff. The lease does not contain the clause of avoidance expressly required by s. 59, and is therefore "null and void" under that section. In *Chapter of Southwell* v. *Bishop of Lincoln* (1) and *Magdalen Hospital* v. *Knotts* (2) the similar words "utterly void and of none effect" in s. 3 of the 13 Eliz. c. 10 were construed strictly and a grant or lease not in conformity with the section held void and not voidable. Again, in *Bishop of Bangor* v. *Parry* (3) a lease granted by charity trustees for more than twenty-one years without the approval of the Charity Commissioners was held entirely void under the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29, and not good for twenty-one years.

It will no doubt be contended, in reliance on the decisions in Bacon's Abridgment, title Leases H, 7th ed. vol. iv. p. 762, that the lease is good against the defendant personally, the rector being a corporation sole. In *Magdalen Hospital* v. *Knotts* (2) the corporation was a corporation aggregate without a head, so that those decisions were not applicable. But both Lord Cairns L.C. and Lord Selborne found some difficulty in understanding the principle on which they were decided. Lord Cairns thought they probably proceeded on personal estoppel, Lord Selborne that they were based on an inaccurate process of reasoning. It was not necessary to overrule them, but the dicta are distinctly adverse to their being extended.

Leases by parsons became void by non-residence for eighty days under the 13 Eliz. c. 20 and did not continue good against the grantor: Bacon's Abridgment, title Leases F, 7th ed. vol. iv. pp. 731, 732; *Quilter* v. *Mussendine* (4); *Doe* v. *Barber* (5); *Jennings*

(1) (1675) 1 Mod. 204; 2 Mod. 56.
(2) (1879) 4 App. Cas. 324, 332, 333, 335.
(3) [1891] 2 Q. B. 277.
(4) (1726) Gilb. Eq. 228.
(5) (1788) 2 T. R. 749.

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v. *Haithwaite* (1); *Frogmorton* v. *Scott*. (2) On the language of s. 59 of the Pluralities Act, 1838, this lease is entirely void ab initio.

[SWINFEN EADY J. Is that contention consistent with the proviso? It amounts to saying that if the tenant is allowed to remain until he is turned out under the Act, owing to the bishop requiring personal residence, he has a statutory remedy in damages; but if he is turned out by the lessor sua sponte on the ground that the lease is void ab initio he has no remedy. Surely that cannot have been intended.]

The damages are only given for the inconvenience of being evicted by summary process. Apart from the bishop's order the lessor could only turn the tenant out by the slow process of ejectment, and in that case there would be no damages.

Micklem, *K.C.*, and *Dighton Pollock*, for the defendant. The proviso to s. 59 shews that the words "null and void" cannot be construed strictly. The words "may be required" no doubt mean "is liable to be required" to reside, and the condition of avoidance ought to have been in the lease. But its absence does not avoid the lease ab initio. It is good as between the parties till the bishop interferes. Under the 13 Eliz. c. 10, which was intended to protect successors, a lease was good against the grantor in the case of a corporation sole or during the life of the head in the case of a corporation aggregate: Bacon's Abridgment, title Leases H, 7th ed. vol. iv. p. 762; 2 Phillimore's Ecclesiastical Law, 2nd ed. p. 1294; Maxwell on Statutes, 4th ed. p. 315. The cases in Bacon's Abridgment are recognized and distinguished without being overruled in *Magdalen Hospital* v. *Knotts*. (3) The Pluralities Act, 1838, is, however, far more analogous to the 13 Eliz. c. 20 than to the 13 Eliz. c. 10. The object of the 13 Eliz. c. 20 and the Pluralities Act, 1838, was to provide for personal residence, not to protect successors. Under the 13 Eliz. c. 20 the lease was good ab initio, but became void on non-residence for eighty days. The similar object of the Pluralities Act, 1838, is attained if the lease is treated as good ab initio, but void in the event of the bishop ordering

(1) (1607) Yelv. 106. (2) (1802) 2 East, 467.
(3) 4 App. Cas. 324, 332, 333, 335.

personal residence. This is the only construction consistent with the proviso.

Hon. E. C. Macnaghten, K.C., in reply. There are three possible constructions of s. 59. (1.) The lease is null and void ab initio. This is the plain meaning of the language. (2.) The lease is voidable by either party. This has not been suggested. (3.) The lease is good ab initio, but becomes void ipso facto on the bishop's order. This is the defendant's contention. No doubt such a construction would fulfil all the objects of the Act. It was in fact the actual provision in an earlier statute. But the present statute for some reason has gone further.

It is necessary to look at the previous legislation.

The 21 Hen. 8, c. 13, s. 26, defined and imposed a penalty for non-residence, with certain exceptions (s. 28), including the case of scholars at the universities. The 28 Hen. 8, c. 13, dealt with colourable residence at the universities.

The temporary Act 13 Eliz. c. 20, continued and explained by the 14 Eliz. c. 11, 18 Eliz. c. 11, and 43 Eliz. c. 9, and made perpetual by the 3 Car. 1, c. 4, avoided leases on the parson's absence for more than eighty days in one year, the lease being good until avoided.

The 43 Geo. 3, c. 84, s. 10, repealed the 13 Eliz. c. 20 and its continuations, and provided by s. 34 that agreements for letting houses of residence to which any parson "shall be required" by order of the bishop to proceed and to reside therein "shall be null and void." There was a penalty of 40*s.* a day on any tenant holding over after service of the bishop's order. There was no provision for summary ejectment, but by s. 35 the parson was not liable for penalties while the tenant continued to occupy.

The lease was apparently good until the parson was actually required to reside.

This was made quite clear by the 57 Geo. 3, c. 99. Sect. 1 repealed the 43 Geo. 3, c. 84, and also the 13 Eliz. c. 20 and its continuations quoad leases. Sect. 32 provided that agreements for the letting of the house of residence to which any parson "shall be required" by order of the bishop to proceed and to reside therein "shall, upon a copy of such order . . . .

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being served upon the occupier . . . . be null and void." There was a penalty for holding over after service, and also a summary mode of ejectment, but no damages; and by s. 33 the parson was not liable for penalties while the tenant continued to occupy. There was no provision that the lease should be in any particular form. Under this statute the lease clearly only became void on the bishop's order.

The Pluralities Act, 1838, recites and repeals the 21 Hen. 8, c. 13, and the 57 Geo. 3, c. 99, and with those Acts before him the draftsman makes new provisions, including the insertion of the avoidance clause as a sine qua non for the validity of the lease. Sect. 32 imposes penalties for non-residence. Sect. 54 enables the bishop to order residence instead of proceeding for penalties. Sect. 59 deals with an agreement for letting the house of residence to which any parson "may be required," scilicet "is liable to be required," by order of the bishop to proceed and to reside therein. The section does not provide, as in the previous Act, that the lease shall become void on the bishop's order. It provides that the lease "shall contain a condition for avoiding the same upon a copy of such order . . . . being served upon the occupier . . . . and otherwise shall be null and void." By s. 60 the parson is not liable for penalties while the tenant continues to occupy.

No doubt the object of the statute, namely, the enforcement of personal residence, could have been obtained as before by a far less stringent provision than that of s. 59, but the Legislature has thought fit to repeal the previous Acts and to make the insertion of a special clause essential to the validity of the lease. This, as in the case of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), makes the statutory form compulsory: Craies' Statute Law, p. 225. The defendant's construction really makes the statutory requirement meaningless. A lease containing the condition of avoidance becomes void on the bishop's order. According to the defendant a lease without the condition merely becomes void on the same event. The language of the section will not bear this construction, and the present lease is absolutely "null and void."

Cur. adv. vult.

March 23. SWINFEN EADY J. (after stating the facts). The plaintiff contends that the lease is void under the Pluralities Act, 1838, s. 59. The defendant contends that it is voidable only, and has not been avoided and is still binding on the plaintiff.

Under the disabling statutes of Elizabeth, restrictions are imposed upon ecclesiastical corporations, sole and aggregate, and leases not made in accordance with their provisions are declared to be void. The language of 13 Eliz. c. 10 is, "shall be utterly void and of none effect, to all intents, constructions and purposes; any law, custom, or usage to the contrary any ways notwithstanding."

Nevertheless, by a series of decisions it has been established that such leases are not void altogether, but only voidable; that they are good against the grantor himself, if a corporation sole; and in the case of a corporation aggregate good during the life-time of its head, and that they are voidable at the option only of the grantor's successors. In *Magdalen Hospital* v. *Knotts* (1) Lord Cairns explained that these cases probably proceeded on the principle of a personal estoppel by reason of a personal interest in the head of the corporation.

The question therefore arises, ought the same or an analogous construction to be placed on the Pluralities Act, 1838, s. 59?

At common law, a lease by a rector, whatever its terms are, operates in point of law as a demise so long only as he continues parson, for he could not pass a greater interest: *Price* v. *Williams.* (2) Under the statute of Elizabeth and subsequent statutes leases may be made (if the statutory provisions are complied with) binding on the parson's successors, but unless these provisions are complied with they are void against a successor.

Then there are a series of statutes restricting the parson's common law right of letting the parsonage house for the term of his own incumbency, with a view to compelling the parson to reside in his own benefice. By 21 Hen. 8, c. 13, s. 26, non-residence was defined, and a penalty for it imposed. By 13 Eliz. c. 20 leases by parsons of benefices, in all respects well made in

(1) 4 App. Cas. 324, 333. (2) (1836) 1 M. & W. 6, 13.

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the first instance, ceased and became void on absence without leave for more than eighty days in any one year. Under this Act it has been held that the lease absolutely ceases and becomes void through the subsequent act of the parson himself, who may take advantage of the statutory avoidance: see Bacon's Abridgment, title Leases F, and see *Quilter* v. *Mussendine* (1), where the lease was of tithes.

The statute 43 Geo. 3, c. 84, s. 34, made a fresh provision by avoiding all contracts or agreements for letting the residence pertaining to any benefice in the event of any spiritual person being required by the archbishop or bishop to proceed to and reside therein, and the tenant, upon being served with the order of the archbishop or bishop, was bound to give up possession on the date therein mentioned, and in default was liable to a penalty of 40*s.* a day.

It will be observed that, according to this statute, the lease only became void upon the order for residence by the spiritual person being made, and until such order was made the lease was valid. Moreover, the statute does not contain any provision for obtaining possession of the house and premises in a summary manner upon the tenant refusing to give up possession, but it does provide (by s. 35) that no spiritual person shall be liable to a penalty for non-residence while the tenant shall continue to occupy.

Then followed 57 Geo. 3, c. 99, s. 32, which, besides containing a similar provision to the former enactment, also enabled the spiritual person to obtain possession of the premises in a summary manner, by means of a warrant for possession from a justice of the peace.

The plaintiff placed great reliance upon the difference of the language of this section and that of the provision in the Pluralities Act, 1838. The statute of George III. embraces only cases in which the spiritual person "*shall* be required to reside," whereas s. 59 of the Pluralities Act, 1838, refers to any benefice house in which a spiritual person "*may* be required" to reside. He also contended that there was no occasion to restrict the plain meaning of the words "null and void."

(1) Gilb. Eq. 228.

The latter part of s. 59, however, throws some light on the former part. It contemplates the case of a tenant being in possession under a verbal agreement only, or under an agreement in writing not containing the requisite clause of avoidance, and provides that if such a tenant shall be "turned out of possession by virtue of this Act" he shall be entitled to sue the other party to the agreement for damages for being so turned out of possession. This means, in my opinion, for being turned out of possession by reason of the bishop requiring the spiritual person to reside in the residence. The section does not contemplate his being otherwise turned out of possession.

It would be an extraordinary and anomalous result to hold that the rector, after granting a lease without the clause, and giving possession, could maintain ejectment the next day against his tenant and recover possession on the ground that the lease was absolutely void, and without being under any liability for damages to the tenant; while, on the other hand, if the rector allowed the tenant to remain until the bishop interfered and required him to reside in the rectory, he would expose himself to an action for damages by turning the tenant out of possession.

It was suggested that the damages were really given to the tenant by the statute as compensation for the summary way in which he would be turned out on a warrant by a justice instead of by the more leisurely manner of an action of ejectment, but this cannot be maintained. The damages are given to the tenant for being turned out, and not for the manner or process by which he is turned out.

In my opinion, full effect is given to the statute, and to the object of public policy in view, by holding that under s. 59 of the Pluralities Act, 1838, all leases or agreements not complying with its provisions are voidable, and become absolutely null and void upon the spiritual person being required to reside in the benefice. The object of the statute is not to prevent the letting of rectories entirely, as the letting would be valid if the clause of avoidance were inserted; and, notwithstanding its absence, possession of the rectory can, if required, be obtained forthwith. The object of the section in requiring the clause of avoidance to be inserted is, in my opinion, to bring the provisions of the law

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to the attention of all persons renting a parsonage, under the penalty (in the absence of such provision) of the landlord being liable in damages in the event of the tenant being turned out of possession by reason of an order of the bishop. It is not within the purview of the statute to render the lease absolutely void in every case, and no further public end would be thereby gained. I therefore refuse to declare at the request of the lessee that in the present case the lease is absolutely void.

[His Lordship then dealt with the claim for damages and the counter-claim.]

Solicitors: *Foster & De Gex; Beaumont, Son & Rigden, for Beaumont & Son, Coggeshall.*

G. R. A.

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April 8.

BONNIN *v.* NEAME.

[1910 B. 764.]

Partnership—Mortgage of Partner's Interest—Right of Mortgagee to Account—Arbitration Clause—Stay of Proceedings—Discretion — Appointment as Arbitrators of strong Supporters of each Party—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 4—*Partnership Act,* 1890 (53 *&* 54 *Vict. c.* 39), *s.* 31 *sub-s.* 2.

A partnership deed between three partners contained a power for any two partners by notice to determine the partnership so far as the third partner was concerned if he did not keep up his capital. It also contained a clause providing for arbitration in the usual way "if any difference shall arise between the said partners or between one or more of them and the executors or administrators of the others or other of them or between their respective executors or administrators." Two of the partners had given notice to the third, and it was admitted that the partnership had been determined so far as he was concerned. Before this determination the outgoing partner had mortgaged his share. Questions had arisen as to the right of the continuing partners to purchase the outgoing partner's share, and the amount of his interest in the goodwill, which depended on the construction of the partnership deed. The continuing partners gave notice to the outgoing partner that they had appointed an arbitrator and requiring him to do the same. He did this, and the arbitrators agreed on an umpire, but nothing more had been done in the arbitration. The mortgagees brought this action against all three partners for an account of the outgoing partner's share

from the date of dissolution. The continuing partners moved for a stay of proceedings under the Arbitration Act, 1889, s. 4:—

Held, that the right of the mortgagees to an account was an independent right, given by the Partnership Act, and not depending upon the partnership deed; that, the arbitration clause not including in terms persons claiming under the partners, the mortgagees were not bound by the clause and would not be bound by any account taken in the arbitration, and therefore their action for an account could not be stayed.

The Court has a discretion as to staying proceedings under s. 4 of the Arbitration Act, and the facts that there are questions of law to be decided, and, *semble*, that the arbitrators appointed are each of them partisans who have expressed strong opinions in their respective appointor's favour, are reasons for not exercising the discretion by staying proceedings.

By a partnership deed dated February 20, 1905, made between Laurence Harding Neame and George Harding Neame of the one part and Arthur Henry Bonnin of the other part, the parties agreed to carry on in partnership the old-established business of G. F. Neame & Co. for fifteen years; and it was agreed that the capital of the partnership should as on and from January 1, 1906, consist of 100,000*l.*, to be contributed as to 41,666*l.* 13*s.* 4*d.* (being five twelfth parts thereof) each by L. H. Neame and G. H. Neame, and as to 16,666*l.* 13*s.* 4*d.* (the other two twelfth parts) by A. H. Bonnin. These sums were defined as the fixed capital of each partner. Article 4 of the partnership deed provided: "If at any time a partner fail to contribute or maintain to his credit the amount of his fixed capital as herein defined the other partner or partners shall be at liberty to give the partner in default notice in writing requiring him to make up the deficiency of his fixed capital within six weeks after service of such notice and in the event of such notice being given and not complied with the partnership shall be dissolved so far as regards the partner in default."

The deed also contained an arbitration clause in the following terms:—

"If during the continuance of the said partnership or at any time afterwards any difference shall arise between the said partners or between one or more of them and the executors or administrators of the others or other of them or between their respective executors or administrators in regard to the

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construction of any of the articles herein contained or to any division act or thing to be made or done in pursuance hereof or to any other matter or thing relating to the said partnership or the affairs thereof such difference shall be forthwith referred to arbitration in manner following that is to say each of the parties in difference shall appoint an arbitrator and the arbitrators so appointed shall within ten days after the appointment of such one of them as shall be last appointed and before proceeding to determine the matters in difference appoint an umpire but if any of the parties in difference shall refuse or neglect to appoint an arbitrator for the space of ten days after being requested so to do by the other party or parties or shall appoint an arbitrator who shall refuse or neglect to act as such arbitrator then the arbitrator or arbitrators chosen by the party or parties making such request shall appoint an arbitrator on behalf of the party who or the arbitrator named by whom shall refuse or neglect as aforesaid and the award of the arbitrators appointed as aforesaid or of their umpire (as the case may be) shall be final and conclusive between the parties."

A. H. Bonnin had on January 23, 1908, executed a mortgage of (inter alia) all his share and interest in the partnership to the plaintiffs, who were trustees under his father's will, to secure 12,000*l.*; and he had subsequently executed further charges to them for 3840*l.* and 360*l.*

A. H. Bonnin had failed to keep up his fixed capital as required by the partnership deed, and on May 17, 1909, his co-partners gave him notice in writing, in accordance with the deed, to make up the deficiency within six weeks. The notice was not complied with, and it was admitted that the partnership was dissolved so far as A. H. Bonnin was concerned on June 28, 1909.

Questions arose between the partners as to the rights of the partners after the dissolution, and on February 22, 1910, the defendants L. H. Neame and G. H. Neame gave notice to A. H. Bonnin that, differences having arisen concerning questions under the partnership deed, they had appointed an arbitrator in accordance with the arbitration clause and requesting him to appoint an arbitrator on his part. On March 4, 1910, A. H. Bonnin gave his late co-partners notice

that he had appointed an arbitrator. Both parties had appointed as arbitrators their own accountants, who had advised them, and each had expressed a strong opinion in favour of the person appointing him.

The arbitrators had appointed an umpire, but no further steps had been taken.

The plaintiffs as mortgagees of A. H. Bonnin's share brought this action against all three partners. They claimed (1.) to have the defendant A. H. Bonnin's share and interest in the assets of the partnership ascertained; (2.) an account of such share and interest as from June 28, 1909; (3.) payment of what should be found on taking such account to represent or be payable in respect of such share and interest; (4.) for the purpose of ascertaining the said share and interest, and the amount payable to the plaintiffs in respect thereof, that the property of the said partnership might be ordered to be realized.

The defendants L. H. Neame and G. H. Neame moved to stay proceedings in the action on the ground that claims 1, 2, and 4 were differences between the partners within the scope of the arbitration clause and were among the matters referred to the arbitrators already appointed.

The plaintiffs had not been served with a formal notice of the arbitration, but the defendants had stated they should not object to their being present and taking part in the arbitration proceedings.

Micklem, K.C., and *R. H. Hodge*, for the motion. This motion is made under s. 4 of the Arbitration Act, 1889, which gives the Court power to stay proceedings commenced by any party to the submission or any person claiming through or under him. The questions between the partners relate to the right of the continuing partners to purchase Mr. Bonnin's share and to the sum he is entitled to for his share of the goodwill. These questions are within the arbitration clause. The partners, who are the parties to the submission, have agreed to the arbitration and taken all the proper steps according to the deed. The plaintiffs, who are mortgagees of one partner, cannot have any better right than their mortgagor and are bound by the arbitration clause.

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Their rights are regulated by s. 31 of the Partnership Act, 1890. (1) By sub-s. 2 of that section they are entitled after dissolution to an account, but that can only be such an account as their mortgagor was entitled to, namely, an account subject to the provisions of the partnership deed, including the arbitration clause. In *Watts* v. *Driscoll* (2) it was held that a mortgagee of one partner's share was not bound by an agreement between the partners, made after and with notice of the mortgage, for a sale of the mortgagor's share for less than the amount of the mortgage. But that agreement was outside the partnership deed and varied its terms. Vaughan Williams L.J. says in his judgment that if the agreement had been made in pursuance of the partnership deed the mortgagee would have been bound. In this case the partners are acting strictly in accordance with the deed and the mortgagees want to set it aside. [They also referred to Lindley on Partnership, 7th ed. p. 791; Annual Practice, 1910, vol. ii. p. 674.]

Hon. Frank Russell, K.C., and *R. M. Pattisson*, for the mortgagees. This case is not within s. 4 of the Arbitration Act at all. The mortgagees were never served with notice of the arbitration, and rightly, for they were not parties to the submission and could not be bound by the award. The mortgagees do not claim an account under any right given them by the partnership deed, but under the statutory right given them after dissolution by s. 31, sub-s. 2, of the Partnership Act. The Legislature has drawn a marked distinction between the rights of a mortgagee of one

(1) "31.—(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

"(2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

(2) [1901] 1 Ch. 294, 311.

partner's share during the continuance of the partnership and after dissolution. His right after dissolution is to have an account taken. That right cannot be affected by any agreement made between the partners after the mortgage: *Watts* v. *Driscoll*. (2) It cannot be affected by the arbitration clause, for that in terms only extends to the partners and their legal personal representatives, not to persons claiming under them. The dispute is therefore not within the agreement to refer, and the Court has no jurisdiction to stay proceedings. But if we are wrong on that point the Court has a discretion, and this is not a case where it will order a stay, for all the questions are questions of law as to the construction of the partnership deed which are better suited for trial in this Court than before an arbitrator.

Luxmoore, for the defendant A. H. Bonnin. Mr. Bonnin appointed an arbitrator to protect himself, but he desires that the action may proceed.

Micklem, *K.C.*, in reply.

SWINFEN EADY J. This is a motion by two of the defendants in the action "that all further proceedings in the action may be stayed pursuant to s. 4 of the Arbitration Act." Then the rest of the notice of motion is merely explanatory of the ground upon which the motion is based.

The application is under s. 4 of the Arbitration Act of 1889. [His Lordship read that section, and proceeded.] The present proceedings are brought by the plaintiffs, who are mortgagees of the interest of the defendant Arthur Henry Bonnin in the partnership, and the defendants are the two Messrs. Neame and Mr. Arthur Henry Bonnin.

The plaintiffs claim to have an account taken of the share of the defendant Arthur Henry Bonnin and to have payment to themselves so far as the share will extend in satisfaction of their mortgage.

The facts are that under a provision in the partnership articles, and in the events which happened, the Messrs. Neame were entitled to determine, and have in fact determined, the partnership, and that on June 28, 1909, the partnership determined, at all events

(1) [1901] 1 Ch. 294.

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so far as regards the defendant Arthur Henry Bonnin. I gather that there is no dispute as to that fact. Therefore the event provided for by the Partnership Act, 1890, s. 31, sub-s. 2, has arisen.

It is not disputed here that the plaintiffs as assignees of the defendant A. H. Bonnin are now entitled to an account as from the date of the dissolution. The partnership articles contain a provision for arbitration, but in terms it only provides for the determination of differences arising between the partners or some or one of them and the executors or administrators. [His Lordship read the arbitration clause, and proceeded.] The articles do not in terms provide, as the Arbitration Act provides, for any persons claiming through or under the partners.

The question which I have to consider is whether I am satisfied that there is no sufficient reason why the matter should not be referred to arbitration.

The first objection taken on behalf of the plaintiffs is that the matter is not really within s. 4 of the Arbitration Act at all. It is quite clear that under s. 31 of the Partnership Act the plaintiffs are entitled to an account; and I pressed counsel for the motion to say whether he contended that the plaintiffs would be bound by the result of any account taken in the arbitration. It appears to me they would not be bound. The statute recognizes their right to an account, that is, to have that account taken. They cannot be compelled to come into the arbitration. No notice to appoint an arbitrator has been served upon them. They have not appointed any arbitrator. No such notice could be served upon them; they could not be required to appoint an arbitrator. Then how can an account taken behind their backs, and to which they are not parties, bind them? If I were to determine that they were bound by an account taken as between the partners, it would be not to allow them the right which the statute confers upon them. They are entitled to an account, and to hold that they are to be bound by an account taken in their absence and that unless they can shew some fraud or some manifest error they are not to be entitled to come to the Court for an account would be to ignore the language of the statute altogether.

Then it was said, "We are willing to allow them to come

into the arbitration; no doubt the arbitrator would take the view that the costs were not thereby to be increased, and would only allow one set of costs to the outgoing partner and his assigns." They declined the invitation. They are not bound to come into arbitration. Then it is said, "The order should be either to stay the action and let the arbitration proceed or make some order with regard to the way in which the account is to be taken." But the motion really is to stay the action, and it seems to me one sufficient answer to say that the plaintiffs are entitled to an account, and they are not parties to the arbitration; they would not be bound by any account taken in the arbitration behind their backs, and therefore that their own action for an account ought not to be stayed.

There are other reasons why I think it is not right to stay this action. The principal points in dispute appear to be matters of law arising on the construction of the partnership articles. There is a question as to whether the continuing partners are in fact entitled to buy out the share of the outgoing partner or whether the whole of the assets should be realized. Then there is a very serious question as to the principle upon which, according to the true construction of the articles, the value of the goodwill is to be arrived at, and, when that value is arrived at, and whatever its value, the extent of the interest of the outgoing partner therein. There is power under s. 19 of the Arbitration Act for the Court or judge to require the arbitrators or umpire at any stage of the proceedings to state in the form of a special case any question of law arising; but the fact that there are these questions of law arising is an additional reason why the action should be allowed to proceed.

Then there is a further reason which has considerable weight with me. I am asked to stay the proceedings and allow an arbitration to go on because it is said that each party has already appointed his arbitrator. The defendant Arthur Henry Bonnin, although he has appointed an arbitrator, appears separately by counsel and desires that the action should go on so far as he is concerned, stating that he appointed an arbitrator to protect himself, to prevent the plaintiffs' arbitrator proceeding as sole arbitrator or to prevent the plaintiffs appointing an

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arbitrator, but that his desire is that the action should proceed. When I look to the arbitrators I find that the arbitrators on each side—it does not refer to one side only, but to both—are accountants who have taken a very active part in advocating the views of their respective clients, that is, the hostile parties to this litigation, the two continuing partners on the one side and the outgoing partner on the other. One of the continuing partners has made an affidavit in which he referred to a long letter of one of the arbitrators; this is a very long letter running into many foolscap pages, a long argumentative letter —I daresay a very proper letter for an advocate of one of the parties to write—in which he expresses a very clear and strong opinion as to the rights of one of the parties. Now in my judgment it is not right and proper that arbitrators should be appointed who are the advocates of the parties, who have been concerned in advocating the respective rights of their clients and who have already expressed themselves in strong terms with regard to the merits of their respective claims. Arbitrators should be persons who are prepared to exercise an independent judgment on the matter, free from partiality or bias, and not mere advocates of the parties. This is an additional factor in enabling me to arrive at the conclusion that it is not a case in which I ought to let the arbitration proceed and stay the plaintiffs' action.

The result is that the motion fails.

Leave to appeal was asked for and refused.

Solicitors: *Pothecary & Co.; Hores, Pattisson & Bathurst; Richard F. Yeo.*

J. R. B.

In re SANSOM AND NARBETH'S CONTRACT.

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April 14, 20.

[1909 S. 293.]

Vendor and Purchaser—Conveyance—Plan.

In simple cases a purchaser is entitled to have land conveyed to him by reference to a plan on his conveyance.

VENDOR AND PURCHASER SUMMONS.

On November 25, 1909, the vendors, as trustees for sale under Micah Sansom's will, put up certain freehold properties for sale by auction.

Lot 2 was described as "The freehold dwelling house and shop No. 92, High Street, Eltham, situated at the corner of Elizabeth Terrace . . . . let to Mr. W. A. Narbeth, draper, on lease for 62 years from Lady Day 1894 at 40*l.* for the first 12 years, and for the remaining 50 years at 63*l.* per annum."

The tenant Narbeth purchased lot 2. The particulars and conditions did not contain or refer to any plan.

The purchaser, having examined the abstract and accepted the title, prepared and submitted a draft conveyance containing a plan with dimensions marked thereon.

The vendors' solicitors approved the draft, but struck out the reference to the plan, adding in the margin "The vendors do not agree to convey by plan. We have no measurements on our deeds."

In reply to the purchaser's solicitors, who asked that the draft should stand as drawn, the vendors' solicitors wrote on December 29, 1909: "Our clients sold as trustees and they will only convey as trustees. We have already stated they will not convey by plan." The first sentence referred to a suggestion that the vendors should also convey as personal representatives.

The purchaser's solicitors, however, engrossed and sent the conveyance to the vendors' solicitors with the plan thereon.

On January 7, 1910, the vendors' solicitors replied: "We return the engrossment of the conveyance which our clients decline to execute as you have put upon it a plan. We have twice informed you that they decline to convey by plan."

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On January 26, 1910, the purchaser issued this summons for a declaration that he was entitled to have the property "conveyed to him by reference to a plan."

The vendors' title was as follows. On May 4, 1887, No. 92, High Street, Eltham, with other property, was conveyed to Edwin Sansom by a conveyance containing a plan. This conveyance was made the root of title.

On May 4, 1889, Edwin Sansom conveyed the entirety to Micah Sansom by a conveyance incorporating the 1887 plan by reference without reproduction. Micah Sansom having sold a portion of the property, devised (inter alia) 92, High Street, Eltham, to the vendors on trust for sale. The surrounding property had been considerably developed since 1887.

After the summons was issued it was agreed that the purchaser should have a plan copied from the 1887 plan on the root of title. The purchaser was entitled to have all the title deeds on completion.

As the plan was now agreed the summons was only brought on to determine the question of costs.

Hon. Frank Russell, K.C., and *Charles Church*, for the purchaser. The vendors might have objected to any inaccuracy in the proposed plan, but they simply refused to convey by any plan at all. The question, therefore, is whether the purchaser was entitled as of right to a plan.

The employment of a plan in aid of the description in the parcels is recommended in Davidson's Conveyancing, 5th ed. vol. i. pp. 63 to 66, and in Dart's Vendors and Purchasers, 7th ed. p. 554, and is recognized in Williams on Vendor and Purchaser, p. 558, but the question whether a purchaser is entitled to a plan as of right is not dealt with. It is, however, stated in Seaborne's Vendors and Purchasers, 7th ed. p. 406, that if the purchaser considers that the words used in the contract do not describe the land which he intended to purchase with sufficient distinctness "he has a right to frame a new description, either by means of a plan or otherwise, as he may deem most convenient."

The passage in the text-book was taken from an opinion of Mr. Brickdale, and the view is stated to have been indorsed by

Farwell J. on May 1, 1902, in *In re Sparrow and James' Contract* [1902 S. No. 695].(1) [The whole passage is set out in the present judgment.]

The same view is adopted in the Law Society's Digest, 1909, par. 632, where the following note is added: "The Council have been supplied with a copy of a judgment of Mr. Justice Farwell, dated May 1, 1902, in an unreported case of *In re Sparrow and James' Contract* (1), in which the learned judge declared that the purchaser was entitled to insist upon a plan being placed on his conveyance, although no plan had been referred to in the contract. The description of the property contained in the contract on which the case was decided was unusually vague, and in the absence of the shorthand notes it is impossible to arrive at the reasons for the decision." See also pars. 648, 689.

The purchaser's briefs, summons, order, and affidavits, with certain correspondence and a draft conveyance, in *In re Sparrow & James' Contract* (1) have been furnished by Messrs. Schultz & Co., but the particulars and conditions and other exhibits are not forthcoming. The property was a farm of about 220 acres in Grosmont, Monmouthshire. It appears from the correspondence that there was a plan on the particulars, but the vendor said there was a paragraph expressly guarding him from guaranteeing its accuracy.

The purchaser, who was a solicitor, put this plan on the draft conveyance. The vendor's solicitors did not strike it out, but put in the words "by way of elucidation and not of warranty." The purchaser put a marginal note saying: "It is submitted that the plan does not elucidate anything, for the property is not sold by reference to boundaries which are stated, but by reference to a plan, schedule of areas, and occupation. The vendors should therefore take the trouble to ascertain if their own plan is correct or not." He also telephoned to inquire in what respect the plan was inaccurate, and the vendor's solicitors replied that it was believed to be accurate.

A few days later the vendor's solicitors wrote saying: "Referring to your telephone communication, we have every

(1) Unreported.

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reason to believe that the plan is an accurate one, but (the mortgagee) need not approve of a plan which has not been gone through by separate surveyors on his behalf. You are in no way entitled at law to be furnished with a plan upon the deed guaranteed as correct by the vendor, and if you insist on conveying by plan you will have to satisfy (the mortgagee) of its correctness at your own expense and obtain his and our further approval to the draft."

After further correspondence the vendor's solicitors wrote saying: "We return the draft conveyance. The words 'by way of elucidation and not of warranty' must stand. Your note in which you say "The property is sold by reference to a plan, schedule of areas and occupation' is not accurate. The property was sold by name, area, situation, occupation, and by its main abuttals, but under the heading 'general remarks' in the commencement of the particulars you will find a paragraph which shows very plainly that the property was not sold by plan. You have in your draft inserted the name, the situation, the measurement and the occupation, and these would be very sufficient parcels without the aid of either schedule of areas or the plan. Aided by the schedule of areas (to which we do not object) the parcels are complete, and if you choose to add the main abuttals and boundaries of the property (correctly) to the draft, we will consent to the addition, but you have no power whatever to attach a plan to your draft and compel us to accept it and guarantee its accuracy, and the fact that that plan is one taken from our particulars does not help you in the least, as we expressly covered ourselves from guaranteeing the accuracy of that plan."

The purchaser thereupon issued a summons for a declaration that he was entitled to a conveyance of the property in the form of the draft conveyance settled by him without the insertion of the words "by way of elucidation and not of warranty."

There is no note of the purchaser's argument, but in his affidavit he said that the position he had taken up was that the vendor "has no right to say that he does not know what his property is and shelter himself from liability by inserting in the conveyance words which make the plan so ambiguous as to be

absolutely valueless, and that if he has any fault to find with the plan he must show where it errs." It has also been ascertained that Mr. Brickdale's opinion was produced in Court on the purchaser's behalf.

There is a short note of the vendor's argument on the brief of the purchaser's leading counsel. The vendor contended that the plan would become part of the parcels. He did not know whether it was accurate or not, and did not want to become liable under covenants for title on the plan. Modern convenience was in favour of an accurate plan, but he objected on the ground of expense. It was also not clear that the mortgagee could be compelled to convey by plan.

Farwell J. declared that the purchaser was entitled to have his conveyance in the form of the draft settled as aforesaid without the words "by way of elucidation and not of warranty," and that he was entitled to be furnished with a plan to supplement the particulars and conditions of sale.

As far as one can judge from these materials the position was this. The vendor apparently took the view that the purchaser was not entitled as of right to a plan, but he was willing to allow it with the qualifying words.

The purchaser's view was that he was entitled as of right to a plan without qualification, and if the submitted plan was wrong the vendor must correct it.

This view is really borne out by the judgment, which struck out the qualifying words and declared that the purchaser was entitled to be furnished with a plan to supplement the particulars and conditions.

Hon. E. C. Macnaghten, K.C., and *Ribton*, for the vendors. Our real objection was to the purchaser's plan.

[SWINFEN EADY J. You did not say so. Before action you refused to convey by any plan at all. That is the only point now before me.]

A purchaser is entitled to have "such a description of the property sold as will clearly identify the land intended to be assured." If the description in the contract is "misleading, inadequate or obsolete," he may insert an accurate description, and in these circumstances the vendor must convey by the new

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description. But it is questionable whether a vendor who has sold lands "by a description accurately applying to them" and has satisfactorily proved title and identity can be required to undertake the burden of verifying and conveying by a different description from that by which he sold: Williams on Vendor and Purchaser, p. 557.

A purchaser is only entitled as of right to a plan (*a*) if the contract is for a sale by plan, or (*b*) if the parcels cannot otherwise be sufficiently described. Neither of these conditions applies in the present case.

In *In re Sparrow and James' Contract* (1) there was a plan on the particulars, and, though the vendor thought he had expressly guarded himself against guaranteeing its accuracy, Farwell J. probably considered that there was a contract for sale by plan and ordered a supplementary plan to be supplied. The decision turned on the special circumstances, and is no authority for the general proposition that a purchaser is entitled to a plan in every case, quite apart from contract or necessity. The question of necessity is a question of fact and ought not to be left to the arbitrament of the purchaser, as suggested in Seaborne's Vendors and Purchasers, 7th ed. p. 406. The note in the Law Society's Digest, 1909, par. 632, is obviously inaccurate.

Secondly, the purchaser is a lessee and must know and keep his own boundaries distinct: *Spike v. Harding.* (2)

[SWINFEN EADY J. That is what he is anxious to do by a plan.]

Thirdly, the vendors are trustees. "A trustee can be called on to convey only by the words and descriptions by which the conveyance was made to him. In this respect he is like a mortgagee": *Goodson* v. *Ellisson.* (3) The present vendors ought not to be made to covenant for title by plan.

Hon. Frank Russell, K.C., in reply. There is nothing in the last two points. A lessee is entitled to the same rights as an ordinary purchaser. The vendors only covenant against incumbrances, and their liability will in no way be increased by a plan.

(1) Unreported.
(2) (1878) 7 Ch. D. 871.
(3) (1826) 3 Russ. 583, 594.

SWINFEN EADY J., after stating the facts and reading the correspondence as shewing that the dispute before action was not as to the accuracy of the plan submitted, but as to whether the vendors were under any liability to convey by reference to a plan at all, continued :—The question, therefore, is whether the purchaser was right in claiming to have a plan on his conveyance.

It is said that there is no direct authority on the question, although most of the books on conveyancing, shewing the practice of conveyancers, refer to the advantages of a plan and to the importance, if there is one, of its being accurate.

In Seaborne's Vendors and Purchasers, 7th ed. by Mr. Jolly, p. 405, the following passage appears: "Parcels.—Very great care should be taken by the purchaser to correctly describe the property intended to be conveyed. It is considered by some practitioners that a vendor may insist on a repetition of the exact words of the contract, and may refuse to convey by any other description; but this is a misapprehension. The subject-matter of the contract is not words, but land; and if the purchaser considers that the words used in the contract do not describe the land which he intended to purchase with sufficient distinctness, he has a right to frame a new description, either by means of a plan or otherwise, as he may deem most convenient, so that there can be no doubt as to the effect of the conveyance. The vendor is not at liberty to say that he does not know the boundaries of his own land, or does not know what he meant by the contract. It must be assumed that he does know, and if he knows he must be able to say whether the purchaser's description is correct or not; and he should either admit its correctness or point out where it is incorrect." Then at the end of the statement there is a note: "The above is taken from the opinion of an eminent conveyancer; but the view has been indorsed by Farwell J. in an unreported case (*In re Sparrow and James' Contract*)." (1)

I have had the advantage of referring to the papers in *In re Sparrow and James' Contract* (1) so far as they can now be obtained, that is to say, I have the briefs of counsel, the

(1) Unreported.

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summons, order and affidavits, some correspondence, and a copy of a conveyance, but I have not all the papers. The material documents in that case were the exhibits to the affidavits. I have the affidavits, but not all the exhibits. It is a little difficult to see exactly what the facts of the case were, but I think this much is clear, that in that case the dispute between the parties was not whether there should be a plan upon the conveyance, because the purchaser had inserted a plan and the vendor did not object to the plan, but the point between them was that immediately before the reference to the plan on the conveyance the vendor had inserted the words "by way of elucidation and not of warranty," so that the conveyance as altered by the vendor ran, "which said premises"—following the parcels—"are more particularly described in the first schedule hereunder written and with their respective quantities and boundaries are 'by way of elucidation and not of warranty' delineated or shown on the plan drawn on the back of these presents and therein surrounded by a red verge line." The point between the parties and the point which the learned judge decided was that the vendor was not entitled to have those words "by way of elucidation and not of warranty" inserted in the conveyance, and the order runs: "The judge doth declare that the applicant is entitled to have a conveyance of the said property in the form of the draft conveyance settled by him as aforesaid"—i.e., settled by the purchaser, not the judge—"without the said words 'by way of elucidation and not of warranty.'" There is a further declaration, the reason for which is not clear. The order declares "That the applicant"—that is the purchaser—"is entitled to be furnished with a plan of the said property to supplement the particulars and conditions of sale." I have not sufficient material before me to know to what point that was directed, but it seems that there was a plan on the conveyance, and the qualifying words were ordered to be struck out. I cannot, therefore, take that case as deciding that the purchaser is absolutely entitled to have a plan on the conveyance, but so far as it goes it certainly is in that direction.

In the present case, however, I am satisfied that the purchaser

is entitled to have a plan. There was a plan on the conveyance to Edwin Sansom, and the subsequent conveyance to Micah Sansom was made by reference to that plan. I think the trustees of Micah Sansom's will in the present case are bound to convey by plan. Speaking generally, I am of opinion that the passage I have read from Seaborne's Vendors and Purchasers accurately states the law and the practice. The purchaser is entitled to have in his conveyance an accurate description of the property conveyed. It frequently happens that the property has changed in description and that the old description is no longer appropriate, and, therefore, the purchaser is entitled to have an appropriate description of the property as at the date of the conveyance to himself, and it is a convenient practice, and one which I think the purchaser is entitled to insist upon, that the modern description shall be connected with the old description so that there shall be a continuous description of the property, the property in its modern or new description being connected with the old description.

In a very careful text-book, Williams on Vendor and Purchaser, p. 557, the law is stated thus: "With respect to the parcels or description of the property sold, it appears that the purchaser is entitled to have inserted in the conveyance such a description of the property sold as will clearly identify the land intended to be assured. If, therefore, the description of the property sold contained in the contract be misleading, inadequate or obsolete, the purchaser should insert in the draft conveyance an accurate description of the land, according to its present condition, prepared from his own surveyor's report; and it is thought that in these circumstances the vendor could not refuse to convey the land by the new description." In my opinion that is quite an accurate statement of the law, and the description in the conveyance ought to accord with the state of the property as it is at the date of the conveyance connecting it, as I say, with the old description. On the facts of the present case the purchaser is in my opinion entitled to a plan and to have the plan that has been agreed.

I may add this. I consider that, in all simple cases in which a plan would assist the description, the purchaser has a right to have a plan on the conveyance. I am not, however, prepared

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to say that in every case the purchaser is entitled to have a description by plan. In the case of a considerable estate where the contract does not contain any plan, if a plan were to be insisted upon shewing the abuttals, hedges, ditches, streams, and boundaries at every point, the form of the conveyance, so far as regards the accuracy of the plan, might lead to much litigation—that is—if the exact boundaries had to be defined at every point before the conveyance was agreed between the parties. It will be sufficient for the determination of the present case to hold that in this case and in ordinary simple cases the purchaser, as part of the rule that he is entitled to take the conveyance in his own form, is entitled to have a plan upon the conveyance, and is entitled to a conveyance by reference to that plan. It follows, therefore, that in this case the purchaser is right, and the costs will follow the event.

Solicitors: *Edwards, Heron & Co.; John H. Mote & Son.*

G. R. A.

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1910
March 4, 9, 17.

In re DYSON.
CHALLINOR *v.* SYKES.

[1909 D. 1857.]

Will—Trusts of Real Estate—Power of Sale—Partial Failure of Trusts—Intestacy—Conversion after Death of Heir-at-Law—Real or Personal Estate.

A testator devised real estate upon trust for A. for life with a gift over upon trusts that failed in A.'s lifetime, so that the equitable remainder in fee became vested in the testator's heir-at-law; and the testator gave his trustees an absolute power of sale over the real estate. The heir-at-law died intestate before the real estate was converted by the exercise of the power:—

Held, that the real estate was not converted until the power of sale was exercised, and that the person entitled to the real estate of the heir at the date of the sale, and not his legal personal representative, was entitled to the proceeds of sale.

ADJOURNED SUMMONS.

Joseph Dyson died in 1875, having by his will given his residuary real and personal estate to trustees upon trust for his

wife for life, and after her death upon trust for his daughter Jane Dyson for life for her separate use, and after her death upon trust for her children as therein mentioned, with a gift over, in case his daughter should have no child (which event happened), upon such trusts and in such manner as his daughter whether covert or sole should by deed or will appoint; and the testator declared that it should be lawful for his trustees or trustee at any time or times to sell and dispose of his real estate or any part thereof by public auction or private contract as therein mentioned, and directed that his trustees or trustee should invest the proceeds of sale and should hold the investments and the income thereof upon the trusts thereinbefore declared concerning his residuary real estate.

Jane Dyson was the only child and heiress-at-law of the testator. She married the plaintiff, Edward Challinor, in 1880, and died in 1883 without having had a child and without having exercised the power of appointment given to her by the will. The plaintiff subsequently took out letters of administration to her personal estate.

In 1901 the then surviving trustee of the testator's will, in exercise of the said power of sale therein contained and for the purposes of the will, sold the testator's residuary real estate for some 1100*l.*

In 1909 Elizabeth Dyson, the testator's widow and the tenant for life under his will, died. There being an intestacy as to the testator's residuary estate by reason of the failure of the trusts of the will, the question arose as to who was entitled to the 1100*l.* representing the proceeds of sale of the residuary real estate, and this summons was taken out to determine the matter.

Whinney, for the plaintiff. Where there is an absolute power of sale the same principle applies as on a trust for sale, and when conversion takes place there is no equity between the heir-at-law and next of kin. They take the fund as they find it: *Walter* v. *Maunde* (1); *In re Richerson* (2); *Curteis* v. *Wormald.* (3) Here

(1) (1815) 19 Ves. 423, 428. (2) [1892] 1 Ch. 379.
(3) (1878) 10 Ch. D. 172.

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Jane Dyson was entitled to this equitable remainder as the testator's heiress-at-law. It was part of her real estate, and when it fell into possession on the death of the tenant for life it was personalty and it passed as part of her personal estate to her legal personal representative, the plaintiff.

D. D. Robertson, for the heir-at-law of Jane Dyson. There is a distinction between a trust and a power of sale. Under a power of sale there is no conversion until the power is exercised, and the time when the power is exercised is the important date. On Jane Dyson's death intestate in 1883 her real estate devolved as real estate on her heir-at-law and became his real estate, and it was his real estate when it was sold under the power in 1901. He therefore is entitled to the proceeds of sale, and not the plaintiff: *Attorney-General* v. *Lomas* (1); *In re Bird* (2); *Polley* v. *Seymour*. (3)

Whinney, in reply, cited *Fletcher* v. *Ashburner* (4); White and Tudor's Leading Cases, 7th ed. vol. i. p. 353; *Lawes* v. *Bennett* (5); *Ex parte Hardy*. (6)

Cur. adv. vult.

March 17. NEVILLE J. In this case, there being a partial intestacy in respect of real estate over which there was a power of sale, it is not disputed that the heiress-at-law of the testator became entitled upon his death. But the heiress-at-law having died before conversion, and the estate having been now converted into money, it is said that her legal personal representative is entitled to the money, and not the person entitled to her real estate. At the death of the heiress-at-law the interest in remainder was real estate and descended to her heir-at-law, but it is said that the subsequent conversion divested it and transferred the interest to the legal personal representative of the heiress.

In my opinion, according to the general principles of conversion, real estate subject to a power of sale is not converted until the power of sale is exercised. Conversion under a power of sale has

(1) (1873) L. R. 9 Ex. 29, 33.
(2) [1892] 1 Ch. 279.
(3) (1837) 2 Y. & C. Ex. 708.
(4) (1779) 1 Bro. C. C. 497.
(5) (1785) 1 Cox, 167.
(6) (1861) 30 Beav. 206.

no retrospective effect and does not divest the interest of the person entitled beneficially to the land at the time of conversion, but merely changes his interest from an interest in real estate to an interest in personal estate, so that his personal and not his real representatives would upon his death become entitled. In other words, conversion under a power does not take away from a person the interest he then possesses, but only changes the character of the interest. *Lawes* v. *Bennett* (1) was relied upon as shewing that upon conversion the estate hitherto vested in the heir reverted to the legal personal representative, but it was a case of an option to purchase and is not in accordance with the general principles of conversion and is not to be extended: see *Townley* v. *Bedwell* (2), *Collingwood* v. *Row* (3), and *Edwards* v. *West.* (4) The case of *Ex parte Hardy* (5) only decides that a compulsory purchase of land by a corporation did not so convert the land as to withdraw the purchase-money from an option to purchase given by the testator. In my opinion the person entitled to the real estate of the heiress-at-law at the date of the sale is now entitled to the purchase-money as personal estate.

Solicitors: *Church, Rackham & Co., for J. Trewavas, Bradford; Jaques & Co., for Kidd, Meller & Fletcher, Holmfirth; Bell, Brodrick & Gray, for E. S. Challinor, Hanley.*

(1) 1 Cox, 167.
(2) (1808) 14 Ves. 591.
(3) (1857) 3 Jur. (N.S.) 785.
(4) (1878) 7 Ch. D. 858.
(5) 30 Beav. 206.

H. L. F.

NEVILLE J. WILLMOTT *v.* LONDON ROAD CAR COMPANY, LIMITED.

1910

April 6.

[1909 W. 2371.]

Landlord and Tenant—Lease—Covenant not to assign without Consent—Consent not to be withheld from "a respectable and responsible person"—Assignment to Limited Company after Consent refused—Forfeiture of Lease.

A lessee covenanted to use the demised premises for the business of a jobmaster and livery stable keeper, and not to assign or underlet or part with the possession of the premises without the written consent of the lessor, which was not to be withheld from "a respectable and responsible person." The lessor having refused his consent to an assignment of the lease to a limited company whose solvency was not questioned the lessee, on the ground that such refusal was unreasonable, let the company into possession of the demised premises:—

Held, that a limited company, i.e., a corporation, was not "a respectable and responsible person" within the meaning of the covenant, and that the lease was forfeited.

Harrison, Ainslie & Co. v. *Barrow-in-Furness Corporation*, (1891) 63 L. T. 834, followed.

ACTION.

By a lease dated May 31, 1900, the plaintiff granted certain land and buildings at Putney to one Porter for a term of sixty-two and a half years from September 29, 1899, at the yearly rent of 95*l.* 10*s.*, and Porter for himself, his executors, administrators, and assigns, covenanted (amongst other things) to use the premises for the business of a jobmaster and livery stable keeper and not without the previous written consent of the plaintiff or his heirs or assigns to assign or underlet or part with the possession of the premises or any part thereof, but such consent was not to be withheld "in respect of a respectable and responsible person"; and the lease contained the usual power of re-entry on breach of any of the covenants therein contained. In February, 1901, the lease was with the plaintiff's consent assigned to the defendants, who entered into and took possession of the premises under the lease.

In 1908 the defendants sold their undertaking and property to the London General Omnibus Company, Limited, and in

December, 1908, the defendants applied to the plaintiff for leave to assign the lease to that company. Negotiations ensued, but eventually, on April 9, 1909, the plaintiff definitely refused to give his consent to the assignment. In the following July the defendants without the plaintiff's consent let the London General Omnibus Company, Limited, into possession of the premises comprised in the lease, who used them as a depot for their motor omnibuses. Thereupon the plaintiff commenced this action and claimed a declaration that he was entitled to re-enter and to recover possession of the demised premises as on a forfeiture of the said lease by reason of (inter alia) the defendants having without his written consent parted with the possession of the premises to the omnibus company on the ground that that company was not a person within the meaning of the aforesaid covenant in the lease.

The defendants alleged in their defence that the London General Omnibus Company was "a respectable and responsible person" within the meaning of those words in the lease, and that the plaintiff's refusal to permit them to assign the premises to that company was unreasonable; and the defendants submitted that they were at liberty, notwithstanding such unreasonable refusal on the part of the plaintiff, to assign and part with the possession of the premises to the omnibus company, and counterclaimed for a declaration that they were entitled to assign the said premises to the omnibus company without further application to or receiving the consent of the plaintiff. Several points were raised on the pleadings, but the only one calling for a report was whether the lease was forfeited by reason of a breach of the above covenant.

Peterson, K.C., and *W. H. Draper*, for the plaintiff. We do not dispute the solvency and responsibility of the London General Omnibus Company, Limited, but we contend that a limited company—a corporation—is not a "person" within the meaning of the covenant. It is submitted that the point is covered by the decision of Romer J. in *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation* (1), where it was held that the

(1) 63 L. T. 834.

NEVILLE J. 1910 WILLMOTT v. LONDON ROAD CAR COMPANY, LIMITED.

word "person" in a similar covenant did not include a corporation. If we are right, the defendants are not entitled to relief under s. 14 of the Conveyancing Act, 1881, for sub-s. 6 (i.) of that section expressly provides that the section does not extend to "a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased."

Butcher, K.C., and *W. L. Richards*, for the defendants. The case cited is distinguishable. It was in fact a lease of ironworks, and all that Romer J. decided was that a municipal corporation, which could not carry on ironworks, was not a "responsible person" within the meaning of the covenant in that particular lease. The real question in all these cases is whether, having regard to the purposes for which the covenant is inserted, and the general nature of the document and the context in which it occurs, "person" does or does not include a "corporation." For the purposes of the Conveyancing Act, 1881, which deals with leases and sales, the word "person" is by s. 2, sub-s. xvii., of that Act defined to include a "corporation," and in numerous other statutes the same definition occurs. It was also held by the House of Lords in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1) that in a statute, in the absence of definition, the word "person" prima facie includes a corporation as well as a natural person, unless the objects of the statute force the Court to reject that construction. The same principle, it is submitted, applies to a will, or a lease, or any other document. Here we have an ordinary lease of premises for the purpose of carrying on the business of a jobmaster and livery stable keeper with usual covenants by the lessee, and there is not a single covenant or obligation to be fulfilled by the lessee that a solvent commercial company, like the London General Omnibus Company, Limited, who have horses as well as motor omnibuses, cannot perfectly well perform as well as a natural person, and it is submitted that in this lease "person" includes a corporation. The case really falls within the principle of *In re Jeffcock's Trusts* (2), where trustees of a will had power to grant leases to "any person or persons," and Chitty J., adopting the reasoning in *Pharmaceutical Society* v. *London*

(1) (1880) 5 App. Cas. 857, 861, 868. (2) (1882) 51 L. J. (Ch.) 507.

and Provincial Supply Association (1), held that the trustees were authorized to grant a lease to a limited company. Moreover, *In re Jeffcock's Trusts* (2) was not cited in *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation.* (3)

No reply was called for.

NEVILLE J. I think the same question was practically before Romer J. in the case of *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation* (3) that is now before me. One has to consider what in this particular lease was intended by the words "but such consent shall not be withheld in respect of a respectable and responsible person." Was "a respectable and responsible person" intended to include a corporation? Prima facie, although the word "responsible" may be applicable to a corporation, the word "respectable" cannot, I think, be said to be applicable to a corporation. But then there is another point of view from which the matter has to be regarded, and that is this. In this case this is not the grant of a lease of premises for all purposes, but it is the grant of a lease of premises for a particular purpose, and, if "person" is to be held to include a corporation, it must be held to include all corporations. Obviously the majority of corporations would not be capable of using the premises for the purpose to which the user is confined by the terms of the lease, but if it once be held that "person" includes corporations, then, however remote the powers of the corporation may be from the only legitimate occupation of the premises, still the lessor could not withhold his assent to a proposed assignment to such a corporation so long as they were responsible and (if there be such an equivalent) the equivalent of respectable in the case of a corporation. It seems to me, therefore, that the parties could not have intended to include corporations, some of which at all events could not possibly have devoted the premises to the purpose to which by common agreement they were to be applied. I think, therefore, that I ought to follow the decision of Romer J.

(1) 5 App. Cas. 857, 861, 868. (2) 51 L. J. (Ch.) 507.
(3) 63 L. T. 834.

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and hold that the delivery of possession by the defendants to the London General Omnibus Company, Limited, was a breach of the terms of the lease, and that consequently the plaintiff is entitled to re-enter. There must therefore be judgment for the plaintiff with costs.

Solicitors: *Nicol, Son & Jones; Joynson-Hicks, Hunt & Co.*

H. L. F.

NEVILLE J. 1910 *March* 22; *April* 12.

In re COLUMBIAN FIREPROOFING COMPANY, LIMITED.

[0089 of 1910.]

Company—Winding-up—Debenture—"Floating Charge" within Three Months of Winding-up—Cash paid "at the time of the creation of the charge"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 93, 212.

The Companies (Consolidation) Act, 1908, s. 212, provides that a floating charge on the property of a company created within three months of the commencement of the winding up of the company shall, unless the company is solvent immediately after the creation of the charge, be invalid except to the amount of any cash paid to the company "at the time of or subsequently to the creation of, and in consideration for, the charge."

The question whether any particular payment comes within the terms of the section as being in substance a present advance must always be a question of fact depending upon the circumstances of the case.

As a general rule a payment made on account of the consideration for the charge and in anticipation of its execution and in reliance on a promise to execute it, although made some days before its execution, is made "at the time of" its creation within the meaning of the section.

A company being in need of funds, the directors on November 25, 1909, accepted an offer by S. to advance 1000*l.* upon the security of all the property of the company and passed a resolution that a debenture to be prepared by S. should be executed at the next meeting of the Board. S., relying on the resolution, then paid 350*l.*, and on December 2 a further 350*l.*, to the company on account of the 1000*l.* At the next board, on December 6, the debenture was duly executed in the usual way, and S. then paid 300*l.* as the balance of the 1000*l.*, and registered the debenture on December 23. The company went into liquidation in

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the following January, and the liquidator disputed the validity of the debenture:—

Held, that under the circumstances the whole of the 1000*l.* was advanced "at the time of" the creation of the debenture and that it was a valid security for that sum.

ADJOURNED SUMMONS.

The company was incorporated in 1899 under the Companies Acts, 1862 to 1890, with the object of acquiring and working certain patents. A Mr. Sankey was at all times one of the directors of the company, of whom there were five, and at the time of the transactions after mentioned he was the chairman of the board. In November, 1909, the company had some heavy contracts on hand and required financial assistance, and at a full meeting of the board held on November 20 Mr. Sankey was much pressed by his colleagues to advance the company 1000*l.* to pay wages and for other purposes. Mr. Sankey, who had on previous occasions made loans for short periods to the company which had been repaid, eventually stated that he would come to the assistance of the company if he were assured that the money would be repaid, and it was decided that Mr. Sankey should confer with a Mr. Macdonald, who was present at the meeting, and who was the solicitor of the company and also of Mr. Sankey.

On November 23 Mr. Macdonald wrote Mr. Sankey as follows:—

"As desired, I have thought over carefully the matters discussed at the board meeting yesterday, and the proposal that you shall find 1000*l.* to defray the expenses of the company while some scheme is materialized whereby necessary working capital for the future can be obtained.

"It is a bit difficult for me to approach the subject from the point of view of the company, and also of yourself. So far, however, as it is a matter of choice, I am bound to consider firstly your interests . . . .

"It will be merely prolonging trouble, and involving you more deeply in the company's affairs, if you advance this money without clear and definite likelihood of a new scheme being presented within two or three weeks. Even if a new scheme is presented, and a fresh lease of life can be given to the company, you are not

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one of those who will chiefly benefit by it. If you do what has been asked you will be doing it as chairman of the company, having its interests at heart, and for the benefit pecuniarily speaking of others.

"I will not take the responsibility of advising you to make the loan. For the reasons indicated yesterday, I think that small though the sum be, it would be no easy task, if liquidation follows, to obtain repayment.

"The letters patent are already mortgaged to secure personal guarantees given by the directors . . . .

"If you decide to make the loan, you should stipulate, in my opinion, for the very fullest possible security to cover not only this advance, but the advances and credits by J. H. Sankey & Son, Limited, and Peters Brothers, for which you have pledged yourself to those firms.

"I think that the charge on the patents to which I have alluded must be cancelled with the consent of the parties in whose favour it is given. I think you should then have a first debenture charge on all the assets, including the patents, goodwill, book debts and plant, to secure not only this 1000*l.*, but also sums of about 2000*l.*, advances and debts due to J. H. Sankey & Son, Limited, and Peters Brothers, the loan to be repayable in two months' time at 6 per cent. The debenture would give you the usual full powers in case of default.

"As I have said, it is difficult for me to advise both sides over this transaction, but, after all, if your co-directors are justified in thinking that this money will tide over the difficulty, then the security which I advise you to ask will not embarrass them. They are all experienced men of business, and are quite competent without legal advice to judge in the company's interest whether it is worth while to borrow money on these terms. I think you might put this letter before them and leave them to say yes or no. You will, of course, take no part in the discussion or vote upon any resolution with regard to it. . . . ."

On November 25, at a full meeting of the board, Mr. Sankey handed in Mr. Macdonald's letter to him of November 23 and stated his willingness to make a further advance of 1000*l.* as required from time to time on the terms of the letter, which

was read aloud by the secretary. After some discussion (Mr. Sankey taking no part and not voting), the following resolutions were passed :—

" Resolved that Mr. Sankey's offer as set forth in the letter be accepted, save that the existing charge on the patents instead of being cancelled be postponed to Mr. Sankey's charge.

" Resolved that the seal be affixed at the next meeting to such debenture as Mr. Macdonald should prepare to carry out the arrangement and that Mr. Sankey be requested to advance to-day the sum of 350*l.* on the strength of this resolution."

Mr. Sankey then, under pressure from his colleagues and relying on the resolutions, gave his cheque for 350*l.* on account of the proposed loan of 1000*l.*, and on December 2, at the urgent request of the secretary, he advanced a further 350*l.* on account of the loan. On December 6, at a full meeting of the board (Mr. Sankey taking no part in the discussion and not voting), the seal of the company was, pursuant to a resolution, then affixed in the usual way to a debenture for 3000*l.* that Mr. Macdonald had prepared to carry into effect the resolutions of November 25. The debenture was then handed to Mr. Sankey, who gave his cheque for 300*l.*, being the balance of the 1000*l.* loan. The debenture was dated December 6 and was in common form and operated as a floating charge on the undertaking of the company and all its present and future property ; and the moneys thereby secured became immediately payable if (amongst other things) a distress or execution should be levied on any property of the company, or if an effective resolution were passed for winding up the company, or if a receiver should be appointed of the undertaking and property of the company. This debenture was registered on December 23.

In the beginning of January, 1910, writs were issued against the company by some of its creditors, and thereupon, on January 5, Mr. Sankey issued a writ against the company to enforce his debenture, and on January 11 obtained the appointment of a receiver, when by consent of the company the usual judgment in a debenture-holder's action was made. On January 28 the company in general meeting duly passed an extraordinary resolution for a voluntary winding-up, and a

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liquidator was appointed. The liquidator disputed the validity of the debenture, and Mr. Sankey, whilst conceding that it was not a security for the 2000*l.*, insisted that it was a valid charge for the 1000*l.*

On March 3 the liquidator took out a summons against Mr. Sankey claiming, first, a declaration that the debenture of December 6 was an undue and fraudulent preference of Mr. Sankey over other creditors of the company (but this claim was subsequently abandoned), and secondly, in the alternative, that the debenture might be declared invalid except to the amount of 300*l.* cash paid to the company at the time of or subsequently to the creation thereof, or such other sum as the Court might declare, together with interest after the rate of 5 per cent. per annum. There was evidence that the company was insolvent in November, 1909. The question turned on the construction of s. 212 of the Companies (Consolidation) Act, 1908, which provides:

"Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum."

Jenkins, K.C., and *Le Riche*, for the liquidator. The bona fides of the transaction is not disputed, but it is contended that the two sums of 350*l.* were not advanced "at the time of" the creation of the security. Sect. 93 of the Act requires a charge on the property of a company to be registered within twenty-one days "after the date of its creation," and s. 212 requires that the cash shall be advanced at the time of its creation. The date of the creation of this security was December 6, when the debenture was sealed and issued: *In re Jackson & Bassford, Ld.* (1); *In re New London and Suburban Omnibus Co.* (2)

(1) [1906] 2 Ch. 467. (2) [1908] 1 Ch. 621.

[NEVILLE J. It is clear that you can have an agreement or promise to give a charge: *Ex parte Fisher.* (1)]

If the resolution of November 25 operated as an equitable charge, then the two sums of 350*l.* were advanced on an equitable charge which has not been registered within twenty-one days of its date, and which is therefore void. But if that resolution is only a promise to give a charge, then the two sums of 350*l.* were not advanced at the time of but before the creation of the security, i.e., the sealing of the debenture. The note to the form of certificate in Buckley on Companies, 9th ed. p. 831, with respect to the particulars of the charge to be delivered to the registrar pursuant to s. 93 of the Act supports the view that the date of the execution of the debenture is the date of its creation. Either way, therefore, the two sums of 350*l.* are unsecured, and the debenture is a valid security for 300*l.* only.

Peterson, K.C., and *S. R. Earle*, for Sankey. We do not rely on any charge other than the debenture. The question really turns on what is meant by "at the time of" the creation of the charge. The contention of the liquidator is not a reasonable way of looking at the transaction. If his view is correct, then no man can advance any money to a company on a debenture unless he pays it at or after the actual sealing of the debenture. The section is intended to prevent a charge being given to secure a past debt in respect of which there is no agreement to give a charge, and the true construction of the section is that "at the time of" means "as part of the transaction." Here Sankey advanced his 1000*l.* on the faith of the resolution of November 25, which was a promise to give a debenture at the next board meeting, and it is submitted that the same principle applies as where money advanced on a promise to give a bill of sale is treated as a present advance on the security of the bill of sale when executed: *Ex parte Fisher.* (2)

[NEVILLE J. referred to *In re Jackson & Bassford, Ld.* (3)]

That was a case of fraudulent preference where the debenture was purposely held over to avoid registration. Nothing of the kind exists here. The substance of the transaction must be

(1) (1872) L. R. 7 Ch. 636. (2) L. R. 7 Ch. 644.
(3) [1906] 2 Ch. 467.

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looked at. Here the advance of the money and the giving of the debenture were substantially one and the same transaction, so that the advance was made "at the time of" the creation of the charge. To hold the contrary would make it impossible for a company to issue a prospectus for a debenture issue providing in the usual way for payment of part on application, part on allotment, and the balance as required, because the section would hit all payments made before the actual sealing and issue of the debentures, which would be disastrous. The only reported case in which the word "at" in a statute was considered is *Pool's Case* (1), which was a decision on s. 25 of the Companies Act, 1867, which required a contract for the issue of fully paid up shares to be registered "at or before" the issue of the shares, and North J. said, "It is impossible to suppose that what is meant is a registration at the office at the very moment of time at which the shares are issued, but I think what is contemplated is that the issue of shares and the filing of the contract should be substantially part of one and the same transaction."

Le Riche in reply.

Cur. adv. vult.

April 12. NEVILLE J. In this case, the company being in urgent need of further capital, the chairman, Mr. Sankey, agreed to advance 1000*l.* upon the same being secured upon all the property of the company. Upon November 25 at a board meeting this offer was accepted, and it was resolved that a debenture to be prepared by Mr. Sankey should be executed at the next meeting of the board to be held a week later. Mr. Sankey in reliance upon the resolution gave a cheque for 350*l.* on account of the 1000*l.*, and on December 2 another cheque for 350*l.* The debenture was executed on December 6, when 300*l.*, the balance of the 1000*l.*, was paid to the company. The debenture was registered within twenty-one days from December 6, but more than twenty-one days from the payment of the first sum of 350*l.* The company having passed an extraordinary resolution for a voluntary winding-up within three months from December 6, the question arises whether the debenture is void

(1) (1887) 35 Ch. D. 579, 581.

as a security under s. 212 of the Act of 1908 so far as regards the two sums of 350*l.* paid before the execution of the debenture. It is argued that neither of these sums were paid "at the time of the creation of" the security or subsequently thereto. The question is, what is the meaning in this section of the words "at the time of the creation of the charge"? I think whether any particular payment comes within these words must always be a question of fact depending upon the circumstances of the particular case. The word "time" in this connection must always be to some extent indefinite, for the creation of the security and the payment of the money cannot be simultaneous, and I think that a payment made on account of the consideration for the security, in anticipation of its creation and in reliance on a promise to execute it, although made some days before its execution, is made at the time of its creation within the meaning of the section.

Here I think the two payments of 350*l.* were made in reliance solely upon the promise to execute the debenture at the next meeting and on account of the 1000*l.* which was to be advanced upon it, the payments being made in anticipation of the execution of the debenture to meet the exigencies of the company. I think, therefore, that the whole 1000*l.* was advanced at the time of the creation of the security. Time in this connection is not, I think, a matter to be decided by the clock, but in accordance with the substance of the transaction and upon the determination of the question of whether the advance was or was not a present advance. In confirmation of this view I may refer to the judgment of Mellish L.J. in *Ex parte Fisher* (1), where he says, "We do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale." This summons, therefore, fails and must be dismissed with costs.

Solicitors: *Sims & Syms; Macdonald & Stacey.*

(1) L. R. 7 Ch. 644.

H. L. F.

PARKER J.

1910

Jan. 17, 18, 19, 20, 21, 24; *Feb.* 1.

BREWER *v.* RHYMNEY IRON COMPANY

[1909 B. 305.]

Mines and Minerals—Lease of Coal Mines—Construction—Covenant to work "in a fair, proper, and workmanlike manner and according to the best mode of working for the time being adopted in the neighbourhood"—Covenant not to injure Working of Seams next beneath or next above.

Leases of seven seams of coal for mining purposes contained covenants by the lessees to work the coal "in a fair, proper, and workmanlike manner and according to the best mode of working for the time being adopted in the neighbourhood," and to work the seams "so as not to injuriously affect or make it more difficult and expensive to work the seam or seams lying next beneath or next above," and not to injure or endanger buildings by undermining their foundations or by the working. In the neighbourhood of the mines the system of working usually adopted was the "long wall" system, or the "Barry" system (a modification of it), under which systems all the coal was worked and no pillars were left. In an area of forty-two acres, beneath a village in which there were many houses, the lessees worked the lower vein of the two into which the seam there lying was divided on the "pillar and stall" system, under which many large pillars of coal were left to support the surface and houses:—

Held (1.) that, in arriving at the meaning of what was "fair, proper, and workmanlike" working, all the circumstances must be considered, including the lessees' obligation to support the surface; (2.) that the "best mode of working" meant the best under all the circumstances, and that even the system in general use, if meant, was only to be used where applicable; (3.) that the "pillar and stall" system was properly used under the area of forty-two acres; and (4.) that the covenant as to working seams without injury to others applied to the seven seams demised and not to the two veins of one seam.

By a lease under seal dated April 25, 1890, seven seams of coal, including Ras Las seam, under farms and lands containing 301 acres and 20 perches in the parishes of Gellygaer, in the county of Glamorgan, and Bedwellty, in the county of Monmouth, were demised by E. D. Williams to the Rhymney Iron Company, Limited, for a term of forty years from January 1, 1890 (at certain rents and subject to certain covenants), together with full and free liberty, licence, and authority to the lessees to work, raise, and get all the demised coal for their own use and benefit, "doing so in a proper and workmanlike

manner and according to the most improved system of working collieries adopted in the neighbourhood."

The lease contained, amongst others, a covenant by the lessees as follows: "And will at all times during the continuance of this demise, after the demised coal shall have been reached, work the same continuously (except in case of strikes or unavoidable accidents) in a fair, proper, and workmanlike manner, and according to the best mode of working for the time being adopted in the neighbourhood, and so as that all the marketable coal to be discovered therein, both large and small, not hereinbefore excepted, and capable of being got according to the custom of working the same veins in the neighbourhood, shall and may be fairly and properly worked and raised before the same is given up as exhausted, if that event shall happen before the expiration of that term, and will work the different seams of coal in such succession and by such ways, to all intents and purposes, as not to injuriously affect or make it more difficult and expensive to work the seam or seams lying next beneath or next above it, and also so as to prejudice or injure, as little as may be consistent with the usual mode of working mines similarly circumstanced, the future working by the lessor of the mines and minerals not intended to be hereby demised and left unworked."

The lessees also covenanted that they would not "in the execution of any of the works . . . . injure or endanger the houses, buildings, and erections now or hereafter to be standing on the said lands by undermining the foundation thereof or working the said coal" and would not "commit or suffer to be committed any damage in upon or under the said lands other than such as should be necessary or consequent upon the working of the said mines and the exercise of the said powers according to the true intent and meaning of these presents."

The lease also provided that the lessors should be entitled to put an end to the lease if during the term, by reason of exhaustion of the coal, or of faults, or of bad or unmarketable coal, the lessees should be unable profitably to work the demised coal.

By another lease of the same date and made between the

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of a seam so as not to injuriously affect a seam next above or next below it do not apply as between the Lower and Upper Ras Las.

Romer, K.C., in reply. A lessor and lessee of minerals are at liberty to enter into such terms (not being contrary to the public law) as they may think fit: *Buchanan* v. *Andrew*. (1) The question here is as to the construction to be placed on the terms of the leases, and according to those terms the company cannot, in certain circumstances, work at all under Pontlottyn.

In *Davis* v. *Treharne* (2) the mines were in the same district as those in the present case, and in that case (3) Lord Selborne L.C. says that very similar words to "the best mode of working for the time being adopted in the neighbourhood" "relate simply to the manner of working the mine for mining purposes" and "have no reference to the rights of other persons, which there could not possibly be any local custom in such a district as a county to disregard."

Cur. adv. vult.

Feb. 1. PARKER J. It is not contended that according to the true construction of the mineral leases in question the defendants have no right as against the plaintiffs to extract the coal so as to let down the surface; and I have come to the conclusion that, according to the true construction of these leases, the defendants have this right, provided that they make compensation for surface damage and do not injure or endanger any houses, buildings, or other erections, whether existing at the date of the leases or subsequently built or erected. I cannot construe the leases as conferring the right to let down the houses, buildings, or other erections, doing no unnecessary damage, for this would be, in effect, to ignore the special covenant as to houses, buildings, and erections and leave them in precisely the same position as the general surface.

In both leases the defendants have covenanted to work the demised coal continuously (except as therein mentioned) and "in a fair, proper, and workmanlike manner, and according to

(1) (1873) L. R. 2 H. L. Sc. 286, 288. (2) 6 App. Cas. 460.
(3) 6 App. Cas. 464.

the best mode of working for the time being adopted in the neighbourhood," and so that all marketable coal capable of being got according to the custom of working the same veins in the neighbourhood may be fairly and properly worked and raised before the mines are given up as exhausted, and also to work the different seams in such succession and by such ways to all intents and purposes as not to injuriously affect or make it more difficult or expensive to work the seam or seams lying next beneath or next above; and there is a proviso for cesser of the lease upon the exhaustion of the demised coal.

The plaintiffs complain that the defendants have commenced and, unless restrained, will continue to work the demised coal under an area of forty-two acres which forms the site of the village of Pontlottyn in a way which is unfair, improper, and unworkmanlike, and which is not the best mode of working adopted in the neighbourhood.

It is admitted that the usual mode of working in the neighbourhood of the demised collieries is the system known as the "long wall" method, or a modification of the same known as the "Barry" method, and accordingly the defendants have adopted this method in all their workings, except under the forty-two acres in question. In their statement of claim the plaintiffs contend, as I read it, that the long wall or Barry system ought to have been followed in working the coal under the forty-two acres, but it was proved at the trial that this method could not be adopted without injuring or endangering the houses, buildings, and erections constituting the village of Pontlottyn, and it has been argued that if I hold that, on the true construction of the leases, the defendants are precluded from working so as to cause such injury or danger, the defendants ought to leave the coal under the forty-two acres altogether unworked, because they cannot work it by the long wall or Barry systems, which, it is contended, are the only permissible systems under the terms of the lease.

The system of working actually adopted by the defendants under the forty-two acres is a kind of pillar and stall system, the pillars being left to support the surface, and not, as is usual where this system is adopted, removed by a second working. It

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The system of working actually adopted by the defendants under the forty-two acres is a kind of pillar and stall system, the pillars being left to support the surface, and not, as is usual where this system is adopted, removed by a second working. It

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has been proved, and indeed is fairly obvious, that the efficacy of the support thus left for the surface depends partly on the shape and partly on the size and position of the pillars which are left. The defendants have left rectangular pillars at regular intervals between the stalls in which they have worked the coal, each pillar being from about twenty to twenty-five yards wide, and slightly exceeding the adjoining stall in area, so that the defendants are leaving from 50 to 60 per cent. of the coal in pillars and are working 40 to 50 per cent. only. It is not contended that the pillars left are of an improper shape or in an improper position, or that the defendants can work a larger percentage of coal without injuring or endangering the houses or buildings on the surface. On the other hand, there is no satisfactory evidence that the defendants by this method of working have injured or endangered, or will injure or endanger, such houses or buildings, and if the plaintiffs were seeking to restrain the defendants from adopting the method they have adopted under the forty-two acres on this ground their claim, on the evidence before me, would be in the nature of a quia timet claim only and would, in my opinion, fail for insufficiency of evidence. The question, therefore, is simply whether the system adopted under the forty-two acres is permissible under the covenant to work in a fair, proper, and workmanlike manner and according to the best mode of working for the time being adopted in the neighbourhood.

In considering whether the manner of working is fair, proper, and workmanlike, I think all the circumstances, including the other obligations of the lessees under their leases, must be taken into account. It having been, in my opinion, proved that if the demised minerals under the forty-two acres are to be worked at all without injuring or endangering the houses and buildings of the village of Pontlottyn, it can only be by the method adopted by the defendants, there cannot, in my opinion, be anything unfair, improper, or unworkmanlike in adopting such method, if it can be adopted without breach of their other obligations. The method, however, has also to be the best for the time being adopted in the neighbourhood. Here, too, it seems to me that "best" must mean the best

possible under the circumstances, again having regard to the other obligations of the lessees. It is true that the usual method in the neighbourhood is the long wall system or the Barry system, colliers in this neighbourhood having usually power to work so as to let down the surface and any houses or buildings thereon. But these methods being in the present case excluded by the obligation of the lessees not to injure or endanger houses and buildings, I see no reason why the lessees should not adopt the only method of working which is not excluded by this obligation, and which is, therefore, the best method under the circumstances, more especially as it has been proved to have been adopted in the neighbourhood in at least two cases in which it was necessary or advisable to leave support for houses and buildings, and, on the evidence, adopted with success. I do not read the covenant as compelling the lessees to adopt the system generally used in the neighbourhood, for they are to work by the best of several supposed systems, and there could hardly be more than one system which at the same time could be said to be in general use. If a system superior to the long wall system were introduced into the neighbourhood, pending the currency of the leases, the lessees would, I think, be obliged to adopt such system, if consistent with their other obligations, even if it had not been generally adopted in the neighbourhood. But even if the covenant refers to the system generally in use rather than to the best of several systems in use in the neighbourhood, I think I should be bound, "ut res magis valeat quam pereat," to read the covenant as limited to cases where such system is applicable, and not as compelling the lessees to suspend or justifying them in suspending their colliery operations altogether, the main object of the covenant being clearly to ensure that the lessees shall work continuously and shall work as much coal as possible.

Further, having regard to the fact that the area of workable coal is so important a consideration in determining whether it be worth while for an intending lessee to incur the large initial expense involved in sinking shafts and driving roads and headways and doing other work necessary to be done before he can make a single penny out of the coal proposed to be demised,

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I do not think I ought, unless I am absolutely compelled so to do, to construe a lease of collieries in such a way as to preclude the lessee from working at all so large an area as 10 per cent. of the coal expressed to be demised, more especially as the area which, according to this construction, cannot be worked at all is susceptible of indefinite increase by the erection of further buildings on the surface. In my opinion, therefore, the defendants have not acted in contravention of their covenant to work in a fair, proper, and workmanlike manner and according to the best method of working adopted in the neighbourhood, unless what they have done be in contravention of some other obligation on their part.

It is said, however, that in working as they have done they have broken another covenant in the lease, namely, the covenant to work the different seams by such ways to all intents and purposes as not to injuriously affect or make it more difficult or expensive to work the seam or seams lying next beneath or next above. The demised seams are seven in number and include the Ras Las seam in which the workings in question under the forty-two acres have taken place. The Ras Las seam comprises two veins, the red or Upper Ras Las coal and the Lower Ras Las coal, separated from each other by a stratum of clod of varying thickness. Where the clod is thin these veins can be worked together as constituting a single seam, but where the clod is thick they can only be conveniently worked as separate seams. It is impossible to know certainly, before the seam is proved in any particular locality, whether the veins will have to be worked together as a single seam, or whether they will have to be worked as two seams. The thickness of the clod under the forty-two acres is about two feet, and although with such a thickness it would be possible to work the veins as one seam, it is admittedly more convenient to work them as separate seams. The defendants' operations under the forty-two acres which are in question are confined to the Lower Ras Las coal, but their intention was and is, after working this coal by their pillar and stall method, to work the Upper Ras Las vein in like manner, leaving pillars for the support of the surface immediately above the pillars left in the Lower Ras Las vein. If this be done, the defendants will

have worked both veins, in other words the Ras Las seam, in the only way possible under the circumstances, and it is not suggested that any other seam, either above or below, will be affected.

The plaintiffs, however, say that they are entitled to treat the two veins as separate seams within the covenant, and that the Red Coal or Upper Ras Las vein has been and is being injuriously affected and rendered more difficult and expensive to work by what the defendants have done. In my opinion, the expression "the different seams" means the seven seams demised, and has no application as between the two veins of the Ras Las seam. But even if the plaintiffs are right, and the two veins are to be taken as different seams within the covenant, I am not satisfied on the evidence before me that the Upper Ras Las vein has been or will be injuriously affected or rendered more difficult or expensive to work.

It is said, first, that the system adopted in working the Lower Ras Las vein involves a greater amount of ripping for the purpose of obtaining headway in the roads, including the stall roads, and that ripping injuriously affects the Upper Ras Las vein and renders it more difficult and expensive to work. It appears, however, that, even working the Lower Ras Las by long wall, it is necessary, because of the thinness of the overlying clod and for other reasons, to rip practically all the coal of the upper vein above the roads, including the stall roads, and, therefore, in this respect the pillar and stall system is no more injurious and causes no more difficulty or expense in working the upper vein than the long wall system itself. It could not be reasonably argued that the defendants ought not to work long wall because of this ripping, and similarly I do not think they are thereby precluded from adopting the system they have adopted, the length of the necessary roads being practically the same in either system.

Then it is said that the system adopted will involve greater crushing in the upper vein than would have occurred had the lower vein been worked by long wall, and that thereby and by reason of the upper vein subsiding between the pillars, and not over the pillars, such upper vein will be more difficult and expensive to work. I am not satisfied that what the defendants

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have done will involve greater crushing in the upper vein, or that the pillar and stall system is more expensive or difficult to work than the long wall system. Moreover, I do not think any one would attempt to work the upper vein by long wall without first working out the pillars in the lower vein, and, if this were done, I am not satisfied that the irregularities in level in the various parts of the upper vein would be such as to cause any real difficulty or any extra expense. In my opinion, such subsidence as there will be between the pillars will be small and uniform, and not likely to affect appreciably, if at all, the cost of working the upper coal, whatever system be adopted. I am of opinion, therefore, that the plaintiffs have not proved their case in this respect, even if the covenant on which they rely is applicable to the manner in which the defendants have worked and intend to work the two veins of the Ras Las seam.

Further, I am inclined to doubt whether, according to the true construction of the lease, the covenant can be construed as widely as the plaintiffs contend. I doubt whether the defendants would be precluded from working the Lower Ras Las by long wall merely because in so doing they had to rip the Upper Ras Las coal, or merely because in the necessary subsidence of the Upper Ras Las there would be some necessary crushing, or merely because it might, as it probably would in the case of coal near the boundaries of the colliery, be more expensive to work the upper coal than it would have been if such upper coal had been worked first, provided the defendants have worked fairly and properly and by a method authorized by the leases.

I come to the conclusion, therefore, that the plaintiffs have not made out their case, and accordingly I dismiss the action with costs.

Solicitors for plaintiffs: *Taylor, Rowley, Lewis & Davis, for W. S. Gustard, Newport, Mon.*

Solicitors for defendant company: *Beamish, Hanson, Airy & Feiling, for Gwilym James, Charles & Davies, Merthyr Tydfil.*

F. E.

Considered. CREERY v. SUMMERSELL. [1949] Ch. 751

MATTHEWS *v.* SMALLWOOD.

PARKER J.

1910

Feb. 24, 25, 28.

[1909 M. 664.]

Landlord and Tenant — Ambiguity in Lease — Explanation by Reference to Counterpart — Forfeiture — Waiver — Onus as to proving Lessor's Knowledge of the Facts — Relief against Forfeiture — Breach of Covenant not to sub-let without Consent — Effect of Negligence — Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 14 — *Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict.* c. 13), *s.* 4.

A patent ambiguity in a lease may be explained by a reference to the counterpart.

A right to re-enter under a lease is not waived by the lessor unless, knowing the facts on which the right arises, he does something unequivocal which recognizes the continuance of the lease.

The question whether there has been a waiver in such a case is one of law, and the onus is on the lessee to adduce some evidence of the lessor's knowledge, and proof of an act shewing recognition of the tenancy does not throw the onus of proving want of knowledge on the lessor.

Property held under a lease which contained a covenant against underletting without the consent of the lessor, and a clause of forfeiture in case of any breach of covenant, was mortgaged by sub-demise to the trustees of a company's debenture stock deed. The deed comprised a number of other properties. The trustees made no inquiry as to whether the lessor's consent was necessary to the sub-demise :—

Held, following *Imray* v. *Oakshette*, [1897] 2 Q. B. 218, that the trustees had been guilty of negligence, and that the Court was precluded from giving them, under s. 4 of the Conveyancing and Law of Property Act, 1892, relief against the forfeiture.

By a lease under seal dated July 29, 1893, the defendant Smallwood demised to Grove (described as "the tenant," an expression which was declared to include his executors, administrators, and assigns) a public-house called "The Fox and Goose," together with a brewery and some land, at Little Bromwich, for twenty-one years from Lady Day, 1893.

The lease contained covenants by the tenant to pay the rent and outgoings and to repair, and that he would not, during the term thereby granted, assign, underlet, or part with the possession of the premises or any part thereof, or do or commit any act or thing whereby or by means whereof the premises or any

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part thereof might be assigned or otherwise disposed of, or the possession thereof parted with, to any person or persons whomsoever for the whole or any part of the term without the consent in writing of the landlord first had and obtained, but such consent was not to be withheld capriciously from any responsible and respectable tenant. The lease also contained a proviso that if the rent should be unpaid for twenty-eight days, or if the tenant should "commit any breach of the covenant" [in the singular] "hereinbefore contained and on his part to be performed," the landlord might re-enter and the lease should thereupon absolutely determine. In the counterpart of the lease this proviso for re-entry was literally repeated except that the word "covenants" was in the plural.

By an indenture of lease dated April 23, 1896, Smallwood demised the public-house and brewery and part of the land to Ind, Coope & Co., Limited, for a further term of ten years from the expiration of the first lease, subject to a similar provision for re-entry "in case of non-payment of rent or breach of covenant," or the happening of other events, in like manner as if such provision had been therein repeated with the necessary modifications. This lease also provided that, if the term granted by the former lease should be determined by absolute recovery of possession under or by virtue of the proviso for re-entry in the former lease, the later lease should become absolutely void and determined.

In the year 1900 Ind, Coope & Co., Limited, issued 800,000*l.* debenture stock, which was secured by a trust deed, dated in the month of September, 1900, whereby the company demised and conveyed certain leasehold and freehold properties to the trustees of the deed to secure the stock. One of the leaseholds was the property comprised in the above-mentioned leases and all the leaseholds were demised to the trustees of the deed for all the unexpired residues of the terms except the last day of each term.

The consent of Smallwood to the sub-demise was not obtained or sought, and the trustees accepted without investigation such title as the company could give them, and did not inquire whether the sub-demise could be made.

On March 16, 1909, the present trustees of the deed, one of whom was an original trustee and the other a trustee who had in 1905 been appointed in the place of an original trustee who had died, brought the present action claiming a declaration that upon the true construction of the leases of 1893 and 1896, and in the events which had happened, Smallwood was not entitled to exercise any right of re-entry on the premises by reason of the sub-demise to the trustees, and, alternatively, an order vesting the premises in the plaintiffs for the residues of the terms; and, if necessary, an injunction to restrain Smallwood from exercising any right of re-entry.

The plaintiffs and the company alleged in their pleadings that Smallwood had accepted rent down to Michaelmas, 1908, with knowledge of the sub-demise contained in the trust deed, thereby waiving any right to re-enter. The plaintiffs also claimed relief against the forfeiture resulting from the exercise of the right.

It was also alleged that Smallwood's knowledge or notice had been acquired in or before 1906 in the course of negotiations for the acquisition by the Birmingham Corporation of part of the demised property and for the grant of a proposed new lease by Smallwood to the company, and in particular by means of a letter to him from the company dated January 5, 1906, which was as follows:

"Dear Sir,—*Re* Fox and Goose, Little Bromwich. You have no doubt already been advised by your solicitor, Mr. Willmot, that the corporation have approached us in regard to the surrender of our interest in strips of land forming a portion of the fields leased by you, and we have arranged to dispose of our interest in them for a sum agreed upon. We write this letter as a matter of form for the satisfaction of the solicitors for our trustees, as we have no doubt you are already fully in touch with the matter, and we shall feel obliged if you will kindly acknowledge receipt."

The company on the same day wrote to Mr. Willmot, enclosing a copy of the letter "which we are to-day writing to Mr. Smallwood at the suggestion of the solicitor of our trustees."

On the following day Smallwood wrote to the company that he

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was fully aware of the negotiations about the strip of land and had instructed Mr. Willmot thereon. (1)

Smallwood, who was not called as a witness because of ill-health, pleaded that he had no knowledge of the trust deed or sub-demise until January, 1909, and that he had not accepted any rent after learning of the trust deed, or otherwise waived his right of re-entry. He counterclaimed for a declaration that he was entitled to re-enter, and for possession of the demised premises, and payment of the arrears of rent and of mesne profits.

Romer, K.C., and *Tomlin*, for the plaintiffs. Admitting that a mortgage by sub-demise is a breach of a covenant not to assign or underlet (see *Serjeant* v. *Nash, Field & Co.* (2)) and that a proviso for re-entry generally applies to a covenant not to underlet (see *Harman* v. *Ainslie* (3)), any forfeiture in the present case has been waived by acceptance of rent after notice of the breach of covenant. The defendant Smallwood had notice of the breach through his agent, whose duty it was to communicate his knowledge to his principal. Waiver is not a matter of intention, but an inference of law: *Croft* v. *Lumley* (4); and where it occurs by receipt of rent the right of forfeiture cannot be reserved: *Davenport* v. *The Queen*. (5) Where there has been acceptance the burden is thrown on the lessor to shew that it took place in ignorance of the facts which occasioned the forfeiture: *Pennant's Case, Harvey* v. *Oswald*. (6)

If there has been a forfeiture, the Court has jurisdiction to grant relief against it. Before the Conveyancing Act, 1881, was passed relief could only be given against forfeiture for non-payment of rent, unless there was fraud, accident, or mistake. Under s. 14 of that Act relief could not be given in the case of breach of a covenant or condition against assigning, underletting, parting with the possession, or disposing of the land leased; but under

(1) As to the effect of the evidence with regard to the negotiations, see the judgment of Parker J.
(2) [1903] 2 K. B. 304.
(3) [1904] 1 K. B. 698.
(4) (1858) 6 H. L. C. 672, 694.
(5) (1877) 3 App. Cas. 115.
(6) (1596) 3 Rep. 64a; Cro. Eliz. 553, 572.

s. 4 of the Conveyancing Act, 1892, the Court can relieve a sub-lessee who has broken any covenant. The lessor may rely on *Imray* v. *Oakshette* (1) as an authority that relief will not be given on the ground merely of the lessee's negligence, but the decision does not really lay down such a general proposition. The Court has the fullest discretion, which must be exercised in each case according to the particular facts: *Ewart* v. *Fryer* (2); *Cholmeley School, Highgate* v. *Sewell.* (3) Relief has been granted under s. 14 of the Act of 1881 without considering the question of negligence: *Quilter* v. *Mapleson* (4); *Bond* v. *Freke.* (5) In the present case the trustees were not negligent, having regard to the number of properties comprised in the trust deed.

G. D. Pepys, for the company. A proviso for re-entry to be effective must be clearly worded: *Doe* v. *Godwin* (6); *Doe* v. *Carew.* (7) The covenant in the lease in the present case is ambiguous and cannot be enforced, and it cannot be interpreted by the counterpart: Sheppard's Touchstone, p. 52. It has never been decided that a covenant against underletting applies to a debenture trust deed. The lessor in this case had constructive notice of the breach and waived the right to forfeit.

A. Grant, K.C., and *Bryan Farrer*, for the defendant Smallwood. Without a knowledge of the breach there can be no waiver: *Walrond* v. *Hawkins.* (8) Waiver or acquiescence by a landlord's agent is only effectual where he has been authorized to waive or acquiesce: *Ashcombe* v. *Mitchell.* (9) In the absence of evidence that Smallwood knew about the sub-demise the Court will presume his want of knowledge. It is unnecessary to call the lessor as a witness: *Roe* v. *Harrison.* (10) The lessor was not called as a witness either in *Doe* v. *Birch* (11) or in *Fryer* v. *Ewart* (12), although it was held that there had been no waiver because there was no proof of knowledge of the breach. The onus lies on the

(1) [1897] 2 Q. B. 218.
(2) [1901] 1 Ch. 499; on appeal, sub nom. *Fryer* v. *Ewart*, [1902] A. C. 187.
(3) [1894] 2 Q. B. 906.
(4) (1882) 9 Q. B. D. 672.
(5) [1884] W. N. 47.
(6) (1815) 4 M. & S. 265.
(7) (1841) 2 Q. B. 317.
(8) (1875) L. R. 10 C. P. 342.
(9) (1895) 12 Times L. R. 17.
(10) (1788) 2 T. R. 425.
(11) (1836) 1 M. & W. 402.
(12) [1902] A. C. 187. See the printed case before the House of Lords.

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tenant to prove knowledge of the breach, and it has not been proved in the present case. *Pennant's Case* (1) is no authority that any onus lies on the lessor. The ambiguity in the lease is a patent one, which may be explained by the counterpart: Norton on Deeds, p. 24; *Burchell* v. *Clark* (2); *Spyve* v. *Topham.* (3) Sect. 4 of the Conveyancing Act, 1892, has never been applied in relief of an underlessee without imposing terms for the lessor's protection. The trustees' negligence is sufficient to disentitle the plaintiffs to relief: *Imray* v. *Oakshette.* (4) It was the duty of the trustees to examine the leases of the properties comprised in the trust deed.

Romer, K.C., in reply. As regards relief, the question is not what duty the lessee owes to his lessor, but whether the former has acted reasonably under the existing circumstances. As regards the onus where waiver is alleged, the pleadings in *Pennant's Case* (1) shew that it is not necessary for the lessee to prove the lessor's knowledge. The report of *Roe* v. *Harrison* (5) does not shew who proved the facts or what the question before the jury was. *Doe* v. *Birch* (6) is not an authority on the question as to onus. In *Ewart* v. *Fryer* (7) it must have been proved or admitted that the lessors had no knowledge. Where subject-matter of an allegation is peculiarly within the knowledge of one of the parties, the general rule that the onus is on the party who asserts the substantial affirmative does not apply: Taylor on Evidence, 10th ed. vol. i. p. 292. Where an agent is employed by the lessor no special authority to waive a forfeiture need be shewn. In *Croft* v. *Lumley* (8) it was an agent who received the rent.

PARKER J. stated the facts relating to the leases of 1893 and 1896 and the sub-demise of 1900, and read the covenant against underletting, stated the nature of the plaintiffs' claim, and continued as follows: The first point I have to consider is

(1) 3 Rep. 64a; Cro. Eliz. 553, 572.
(2) (1876) 2 C. P. D. 88.
(3) (1802) 3 East, 115.
(4) [1897] 2 Q. B. 218.
(5) 2 T. R. 425.
(6) 1 M. & W. 402.
(7) [1901] 1 Ch. 499; on appeal, sub nom. *Fryer* v. *Ewart*, [1902] A. C. 187.
(8) 6 H. L. C. 672, 694.

whether, according to the true construction of the lease, there was a forfeiture of the lease by reason of the fact that in 1900 the assignees, the company, sub-demised the house and lands to trustees by way of mortgage to secure an issue of debenture stock. That depends on the construction which is to be put upon the proviso for re-entry contained in the original lease and incorporated in the lease by which the term was prolonged. It is a proviso for re-entry on any breach of the "covenant" thereinbefore contained. Of course, as there are many covenants thereinbefore contained in the deed, there is there an ambiguity which would be fatal to the exercise of the power of re-entry if it could not be explained or corrected by some other document. The counterpart of the lease is not in precisely the same form, because there the proviso for re-entry is limited to take effect "if the tenant shall commit any breach of the covenants hereinbefore contained," which would be the usual form in a lease where it was intended to make the proviso for re-entry extend to something more than failure to pay the rent. The first question which arises is whether I am at liberty to correct the lease by reference to the counterpart. As regards that point I am referred to what is said in Sheppard's Touchstone, p. 52: "All the parts of a deed indented in judgment of law do make up but one deed, and every part is of as great force as all the parts together, and they are esteemed the mutual deeds of either party, and either party may be bound by either part of the same. And the words of the indenture are the words of either party." And again: "And although both parts of the indenture are but as one deed, yet the part of the grantor is as the principal, and the other is not but a counterpart; . . . . and if there be any difference between the parts the counterpart shall be made to agree with the principal, and it [the error] shall be deemed the misprision of the clerk." Now an analogous point has been raised before in the Courts, and was the subject of the case of *Burchell* v. *Clark*. (1) There, by an indenture of lease dated in 1784 and executed by the lessor, he demised certain premises to hold to the lessee and his assigns for the term of ninety-four and a quarter years, yielding and paying

(1) 2 C. P. D. 88.

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therefor during the said term of ninety-one and a quarter years a yearly rent. The number of years was not mentioned in any other clause of the lease. But the counterpart, executed by the lessee, which was otherwise identical with the lease, had ninety-one in the habendum as well as in the reddendum. In an action by the assignee of the reversion to recover possession against the assignee of the lessee after the lapse of the ninety-one and a quarter years it was held, overruling the judgment of the Common Pleas Division (by Cockburn C.J. and Bramwell and Amphlett JJ.A.; Kelly C.B. dissenting), that, there being a manifest clerical error in the lease, the counterpart might be looked at to ascertain where the mistake lay, and that, on the true construction of the lease and counterpart taken together, the ninety-four in the lease must be rejected and the lease read as a grant for ninety-one and a quarter years only. In that case Cockburn C.J. says (1): "It is perfectly clear that in the deed executed by the lessor there is some clerical error: for the habendum is for ninety-four and a quarter years, while the reddendum is for 'the said term of ninety-one and a quarter years.' Either, therefore, the ninety-four ought to be ninety-one, or the ninety-one ought to be ninety-four. There was a counterpart executed by the lessee at the same time that the lease was executed by the lessor, and the question is whether we can refer to the counterpart in order to see which is the error in the lease. I quite agree that, if there were only one deed, the habendum would be the dominant part, and must prevail, and the reddendum would be subordinate, and must yield, if there were any inconsistency between the two. I agree, also, if there were an inconsistency between the lease and the counterpart, if it were clear that a mistake had been made in not making the counterpart and lease correspond, according to the canon of construction laid down in Sheppard's Touchstone, the counterpart must give way, being the inferior instrument, and the lease, which is the superior instrument, must prevail. But here the difference is not between the lease and counterpart independently of any inconsistency in the lease itself. Here the lease executed by the lessor contains a palpable

(1) 2 C. P. D. 93.

mistake, and the canon of construction does not exclude us from looking to see where the mistake lies by referring to the counterpart. There is nothing in the canons of construction to shew that the lease and counterpart may not be treated as one common instrument, and consequently I can see no reason in common sense, and I find no authority, why we should not ascertain where the manifest error lies. And when we find a manifest discrepancy between the habendum and reddendum in the lease, but no such discrepancy in the counterpart, the habendum and reddendum in the latter being for the same term of years, and when we consider that the counterpart was the deed which the lessor accepted from the lessee, we may well resort to the counterpart to see how the discrepancy between the habendum and the reddendum in the lease itself is to be solved." In that case it was possible in looking at the lease to say it meant this or meant that; and the counterpart was referred to to determine which it should be, whether in fact it should be ninety-one and a quarter years, or whether it should be ninety-four and a quarter years. In the present case it is not possible, on the lease itself, to say that the mistake, which undoubtedly has been made, must be this mistake or that mistake; and that is the only difference between the two cases. The question I have to decide is whether the principle which is enunciated in Sheppard's Touchstone, as explained by *Burchell* v. *Clark* (1), is applicable to the present case. It is perfectly clear, looking at the lease alone, that there is some mistake; there is a patent ambiguity on the face of the deed, it being impossible to say what is meant by "the covenant hereinbefore contained," because there are numerous covenants which are contained in the prior part of the deed. The question is simply whether I can look at the counterpart to see whether there is any particular covenant which is referred to, or whether the mistake lies in the lease in using the word "covenant" in the singular instead of, as in ordinary cases, "covenants" in the plural. In my opinion, the principles laid down in Sheppard's Touchstone and in the case to which I have been referred do enable me to look at the counterpart to explain that patent ambiguity on the face of the lease. Looking at the counterpart,

(1) 2 C. P. D. 88.

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it appears to me that I am entitled to treat the word "covenant" in the lease as a clerical error for "covenants," so that I am to read the deed as though it contained a proviso for re-entry "upon breach by the tenant of the covenants hereinbefore contained," and not of any particular covenant. Reading it in that way, it appears to me on the admitted facts that there was in 1900 a forfeiture giving the lessor the right to re-enter.

The next question is whether that right of re-entry, which I have held accrued to the lessor in 1900, has been waived. I think that the law on the subject of waiver is reasonably clear. The right to re-enter is a legal right which, apart from release or abandonment or waiver, will exist, and can be exercised, at any time within the period fixed by the Statutes of Limitation; and if a defendant in an action of ejectment based upon that right of re-entry alleges a release or abandonment or waiver, logically speaking the onus ought to lie on him to shew the release or the abandonment or the waiver. Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease. It is not enough that he should do the act which recognizes, or appears to recognize, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose. Therefore we get the principle that, though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches which were unknown to the lessor at the time when the act took place. It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say "I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve." That is a position which he is not entitled to take up. If, knowing of the breach, he does distrain, or does receive the rent, then

by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything. Logically, therefore, a person who relies upon waiver ought to shew, first, an act unequivocally recognizing the subsistence of the lease, and, secondly, knowledge of the circumstances from which the right of re-entry arises at the time when that act is performed. My attention has been called to a very early case, *Pennant's Case* (1), from which it was suggested that when once the unequivocal act had been proved the onus of proving want of knowledge lay upon the plaintiff in ejectment. That was, in effect, an action of ejectment in which the tenant pleaded that his landlord had, since the right arose, done some unequivocal act in recognition of the subsistence of the lease, and it was only by way of reply that the question of knowledge came in. The reply was, "True, I did the act, but I did not know all the circumstances under which the right to re-enter arose when I did the act." It was suggested from that form of pleading that when once the defendant in ejectment had shewn the act which could be said to be an unequivocal recognition of the lease the onus was shifted, and the plaintiff in ejectment had to shew want of knowledge at the time the act was done. I do not think, whatever may have been the law at the time when *Pennant's Case* (1) occurred, that that case now represents the law as it stands with respect to the onus of proof. It appears to me that the defence in each case has to shew those circumstances from which the law will imply waiver. Of course it is quite true that where you have a plaintiff in ejectment who is perfectly capable of going into the box and telling his own story—I am talking now of the present time, when evidence of both plaintiffs and defendants is admissible on their own behalf—it is open to the Court or the jury to draw an inference if the plaintiff does not go into the box and say whether he did, or did not, know the true facts at the material dates. But I still think that it is incumbent on the defendant to give some evidence of knowledge at the time; and if no evidence of knowledge at the time is given, it seems to me it would be a case where the judge would have to say that there was no evidence on that point to go to the jury at all; and therefore,

(1) 3 Rep. 64a; Cro. Eliz. 553, 572.

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sitting as both judge and jury here, I could not decide in favour of upholding a defence of waiver unless there were some evidence that the plaintiff in ejectment knew, at the time of the act relied upon, that there had occurred something which gave rise to his right of re-entry.

I must now come to the facts of the present case. Of course, where there is a sub-demise by way of mortgage, the circumstances are such that it is not likely that anybody would know, unless he was actually told, that the sub-demise had been made. The mere fact of knowing that there had been a debenture issue, or that there were trustees for debenture-holders, would not necessarily inform a man who was told those facts that the mortgage had been by way of sub-demise. In the present case, for example, if the mortgage had been by way of equitable charge, with an agreement to give a sub-demise or legal mortgage when called upon, it would have had exactly the same effect for all practical purposes as a mortgage by way of sub-demise; and until you know, or have an opportunity of looking at the precise terms of the deed, the mere general statement that a security has been created in favour of debenture-holders, of which there are trustees, would not give you knowledge of the material facts. The only evidence that I can find of actual knowledge on the part of the defendant Smallwood of the fact that there had been a sub-demise without his consent, and that therefore he was entitled to re-enter, was a letter written to him dated January 5, 1906, which letter was written under these circumstances: At that time the Birmingham Corporation had obtained statutory powers to take land, and among other lands parts of the demised premises, for the purpose of widening a road on which they proposed to lay tramways. I do not think it is in evidence, but I was told in the course of the case that they served notice to treat; and that notice would naturally be served both on the landlord and on the tenant. The person who was negotiating with the tenants, Ind, Coope & Co., Limited, on behalf of the Birmingham Corporation was a Mr. Willmot; and provisionally he had agreed that compensation should be paid to the persons interested in the leasehold premises. This was communicated to the trustees for the debenture stock holders,

and the trustees raised the question whether it was not proper to inform the landlord what was happening; because they said that if the landlord were not informed they might be in some difficulty at the expiration of the lease, which contained a clause providing that at its expiration the premises should be given up to the landlord, and this provision they would be unable to fulfil if they assigned part to the Birmingham Corporation; and therefore they suggested that notice should be given to the landlord of what was being done. Accordingly Ind, Coope & Co., Limited, wrote a letter to Mr. Smallwood in the following terms: [His Lordship read the letter of January 5, 1906, and continued.] The attitude which the company takes up there is simply this: "Our trustees think you ought to be informed of what is going on, and therefore we write this to inform you, and in order that we may have on record that you do know, please answer the letter. We have no doubt you know, and we want to have a record of it, so please answer this letter." There is a reference there to "our trustees," and "our trustees" no doubt means the trustees under the indenture by which the property was sub-demised by way of security to the debenture stock holders. Mr. Smallwood answered that letter next day, and his letter is an acknowledgment by him, as asked for, that he is fully aware of the proceedings which are going on on behalf of the Birmingham Corporation to obtain these strips of land, and that Ind, Coope & Co., Limited, his lessee, is bargaining for the surrender of the lease. He says, it is true, "I have instructed Mr. Willmot thereon"; and, as a matter of fact, he had instructed Mr. Willmot to look after his interests on the sale of the freehold to the corporation in relation to the notice to treat, and that I have no doubt is what he was alluding to at the time. There is nothing in that which makes it at all probable that Mr. Smallwood would grasp the fact that the trustees alluded to were trustees who had taken a mortgage by sub-demise or assignment as against a mortgage by equitable charge with an agreement to give a sub-demise or legal mortgage when called upon; and though possibly it might be said to put Mr. Smallwood on inquiry, it does not appear that he did make any inquiry; and inasmuch as there is nothing in the

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letter to bring home to him the facts upon which his right of re-entry arises, I do not think I ought here, sitting as a jury, to say upon this evidence alone that he had notice of those facts. The question of notice is also put in a slightly different way under the following circumstances. It appears that about the time when the negotiations were going on between the Birmingham Corporation, represented by Mr. Willmot, and the company, and possibly its trustees, with reference to the surrender of the strips of land for widening the road, there were also negotiations going on between the company and the trustees, on the one hand, and Mr. Willmot, representing the landlord, on the other hand, for an extension of the lease. Mr. Willmot, however, was, in my opinion, on the evidence, purely in the position of a land agent or surveyor whose duty it was to obtain for his principal an offer which the principal might either accept or reject. The company was anxious to take a longer term, and was offering terms which Mr. Willmot was considering. As a matter of fact he did not communicate again with his principal at all in the matter, because no terms were suggested on which he could advise his principal. Then came the serious illness of Mr. Smallwood, in consequence of which negotiations, at any rate temporarily, came to an end. During the course of these negotiations,—whether they were negotiations for the purchase by the Birmingham Corporation of these strips of land, the corporation being represented by Mr. Willmot, or for the extension of the term of the lease between the lessees and Mr. Smallwood, Mr. Smallwood being also represented for that purpose by Mr. Willmot,—whether it was in one set of negotiations or the other, it appears from the evidence that mention was made to Mr. Willmot of the fact that there were trustees whose consent would be necessary before there could be any dealing with the property; and mention was made at another time that the property was in trust. Mr. Willmot paid very little attention to what was said on the subject, because, as he said in the box, he did not consider it his business to go into the title to the property; and all that he was employed to do was, on the one hand, on behalf of the Birmingham Corporation

to arrange what compensation should be paid, and, on the other hand, on the part of Mr. Smallwood to negotiate, if he could, terms which he considered acceptable for the prolongation of the lease. The matter of title would only arise when the negotiations either for the prolongation of the lease or for the acquisition by the corporation of the land came to an end. I am satisfied that it was never really brought home to him that there had been a sub-demise by way of mortgage at all; and even if he had been aware of that fact, it certainly was not brought home to him that there had ever been a breach of the covenant in respect of which a right of re-entry might arise. As soon as the question of the conveyance to the corporation arose, after the terms had been arranged, a document embodying the terms of the arrangement, so far as Mr. Willmot had agreed them, was forwarded to Ind, Coope & Co., Limited, and it was revised on the company's behalf by the solicitors who were also acting for the trustees for the debenture stock holders. When it came back, seeing the number of alterations in it, and observing that these alterations were alterations really connected with conveyancing matters, and not with regard to the terms which had been arranged, Mr. Willmot forwarded the document to the solicitors of the corporation, and he does not appear to have ever seen it again; so that, although the document does shew that the trustees would be necessary parties to the conveyance, he did not, although subsequently, no doubt, the solicitors for the corporation did, obtain knowledge of the precise facts in preparing and seeing to the execution of the proper indenture. It is suggested that in these circumstances Mr. Willmot had notice of the fact upon which the right to re-enter arose, and that I must impute that knowledge also to Mr. Smallwood, and that, inasmuch as after these negotiations ceased till a time shortly before the commencement of this action Mr. Smallwood continued to receive rent, I must treat him as having unequivocally recognized the tenancy with notice of the circumstances in which his right of re-entry arose. I do not think that I am at liberty to do so. I do not think that any single one of the facts which are said to have come to the knowledge of Mr. Willmot necessarily brought it home to him that there had been a mortgage by

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sub-demise; and further, even if that fact was brought home to him, it does not appear to me that it was a fact which, having regard to the purpose for which he was engaged, he was in any way bound to communicate to Mr. Smallwood. In these circumstances—even if it be the law that you can impute notice for the purpose of holding that there has been a waiver of breach of covenant—I do not think this is a case where any such notice could be imputed. In the circumstances it appears to me, therefore, that the claim based upon waiver fails.

Then, lastly, I come to the question whether I can give relief under the Conveyancing and Law of Property Act, 1892, against the forfeiture which has occurred. I am not quite sure that the law regulating the circumstances under which relief ought to be given is absolutely clear, or quite theoretically satisfactory. Prior to the Conveyancing Acts the only breach of covenant against which equity relieved as a matter of course was the failure to observe the covenant for payment of rent. In no other case did equity relieve unless there was something additional in the nature of accident or mistake; and it was held that carelessness on the part of the person claiming relief could not be considered in a Court of Equity to be a mistake or accident of a nature which would afford a ground for relief. I think that appears from *Barrow* v. *Isaacs & Son.* (1) In that case Kay L.J. goes into the whole history of the subject and comes to the conclusion that the principle on which relief was given if there were accident or mistake could not be extended to the case of carelessness, because it was precisely one of those cases to which the maxim "Vigilantibus non dormientibus leges subveniunt" ought to be applied. There was also in the case of insurance, prior to the Conveyancing Acts, a statute (22 & 23 Vict. c. 35, s. 4) which provided that, though failure had been made to observe a covenant to insure, equity might, so long as the property had not been destroyed by fire, give relief, provided that there had been no fraud or gross negligence. That, I think, was the condition of the law when the Conveyancing Act, 1881, came into force. This Act provides

(1) [1891] 1 Q. B. 417.

for relief being given to a lessee in respect of any covenant contained in the lease, with certain exceptions, one of which is a breach of the covenant not to assign, underlet, or part with the possession of the property. I do not know exactly why that exception was introduced, but there it is; and even now, in spite of the amending Acts, no relief can be given to a lessee in respect of a breach of covenant against assigning or underletting. But with regard to the differences between the principles adopted in giving relief before and after the Act my attention was called to *Quilter* v. *Mapleson* (1), a case decided almost immediately after the Act was passed. That was a case of relief from a proviso for re-entry for breach of a covenant to insure. When the case came on for hearing in the Court below the Act of 1881 had not been passed, and relief was refused, as far as I can make out, on the ground that there had been gross negligence—that is to say, that the case was not within 22 & 23 Vict. c. 35, s. 4. When the case came on in the Court of Appeal the Conveyancing Act of 1881 had come into operation, and relief was given upon appeal under that Act. That, therefore, amounts to a decision that, in the case of a covenant to insure, relief could be given under the Conveyancing Act, 1881, notwithstanding that the person who had covenanted to insure had been guilty of gross negligence in not insuring. It would appear, therefore, that as far as relief to a lessee under the Act of 1881 is concerned the question of negligence or otherwise is immaterial. Under the Act of 1881 it was held that no relief could be given to an underlessee, and that led to the passing of the Conveyancing and Law of Property Act, 1892, s. 4 of which enables the Courts to give relief to an underlessee in every case; not only in those cases in which they could give relief to a lessee under the earlier statute, but also those cases in which they could not give a lessee relief, including the case of a covenant not to assign or underlet. That was decided in *Imray* v. *Oakshette* (2); but a good deal more appears to have been decided in that case. There L. had purchased an underlease under a contract which did not give him a right to call for the title

(1) 9 Q. B. D. 672. (2) [1897] 2 Q. B. 218.

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of the original lessee, who was bound by covenant not to assign or underlet without licence, and he purchased with the intention of laying out a considerable sum on the property. The Court held unanimously that L. had been guilty of negligence in entering into a contract, whereby he was precluded from investigating the title, and that relief against a forfeiture by the original lessee for breach of the covenant ought not to be granted to him because of that negligence. It would appear, therefore, that though negligence is immaterial in respect of cases in which relief can now be given to a lessee, yet—with regard to the covenants excepted in the earlier Act in respect of which the Court can give relief to an underlessee but not to a lessee—negligence is material. Therefore, if I take that as being the law upon the subject, I have to consider in the present case whether there was any such negligence on the part of the trustees of the debenture trust deed as to preclude them from having relief under this statute. I may say that I feel myself bound by the decision in *Imray* v. *Oakshette* (1), and though it has been a good deal criticized by counsel, I am not sure that the argument on which it proceeds is not sound. Certainly the covenant against assignment and sub-letting is placed by the two statutes, read together, in a totally different position from that in which any other covenant is placed by those statutes. Against forfeiture for breach of this particular covenant no relief can be given to a lessee; that is one of the things, and the great thing; and though it may be given to an underlessee, yet, inasmuch as no relief can be given to a lessee, it is not unreasonable to say that the circumstances under which relief ought to be given to an underlessee must be scrutinized closely, and if the Court has power, it is a power which must be exercised sparingly. If the power is to be exercised sparingly, I see no reason why you should not fall back on the old principle of equity that the law is not for people who neglect their own interest, but only for people who act with a view to the protection of their own interest. Whatever may be the theory underlying the case, it appears to me that I am bound by it, and that I ought not to give relief against this particular covenant unless I am satisfied that the person who

(1) [1897] 2 Q. B. 218.

wants relief has not been guilty of any such negligence as is referred to in this case. I am therefore thrown back upon the circumstances in which the sub-demise was made to the trustees of the debenture trust deed. It appears that those trustees took the security without any investigation of title, simply intending to rely on such title as the company could give them. They also took their sub-demise without considering whether it was a sub-demise which, having regard to the terms of the lease, would be operative, or whether it would or would not be one which would cause a forfeiture. Possibly from the point of view of a business man, having regard to the fact that it was a large property, and to the circumstances in which the issue of debenture stock was made, that may have been a justifiable course. But at the same time, if a man says "This is a case where I will run the risk of there being a defect in the title," or "I will run the risk of the sub-demise which I am taking operating as a forfeiture," I do not quite see why the Court should subsequently interfere to protect him against that very risk. A prudent man, when he is advancing money upon mortgage, will investigate the title; and a prudent man, even if he thinks that he can dispense with an investigation of the title, will, in the case of leaseholds, take care to see that the sub-demise, or instrument for security, which he takes is in conformity with the terms of the lease under which the property is held. There may be reasons, and special reasons, why he should not act in that way in any particular case; but not so to act is a disregard of his own interest and a taking of a risk which he is not compelled to take. It appears to me, therefore, that by deliberately neglecting to investigate the title, and deliberately not asking to see the lease in order to ascertain whether a sub-demise could be granted, the trustees in the present case were guilty of that so-called negligence which is really a disregard of their own interests as distinct from negligence in not carrying out some duty towards somebody else—that recklessness with regard to their own interests which I take to be at the base of the decision in *Imray* v. *Oakshette*. (1) Under the circumstances it appears to me that I really cannot give relief in this case without acting contrary to what has been laid

(1) [1897] 2 Q. B. 218.

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down by the Court of Appeal, and therefore the claim for relief fails.

Solicitors for plaintiffs and the company: *Skewes-Cox, Nash & Co.*

Solicitors for defendant Smallwood: *Stow, Preston & Lyttelton, for Crowder & Smallwood, Birmingham.*

F. E.

EVE J. 1910 *Feb.* 15.

In re QUEEN'S SCHOOL, CHESTER.

[1910 Q. 08.]

Charitable Trust—School—Scheme—Religious Instruction—Government Grant—Board of Education—Modification of Scheme to meet Regulations of Board—Jurisdiction.

Where the primary object for which a secondary school was originally founded cannot be given effect to under its existing constitution without the aid of grants from the Board of Education, the Court will modify the scheme of the Charity Commissioners under which the school was being administered, so far as necessary to comply with the regulations of the Board of Education and enable the school to secure the grants.

PETITION.

This was a petition by the governors of the Queen's School, Chester, presented with the leave of the Board of Education under s. 17 of the Charitable Trusts Act, 1853, asking that it might be referred to chambers to prepare a new scheme for the administration and management of the school, modifying the existing scheme in certain particulars. The object of the petition was to enable the school to comply with the regulations of the Board of Education and obtain Government grants.

The school was originally founded in 1877 and opened in May, 1878, in a private dwelling-house. In 1880 a site for the school was offered by the Duke of Westminster and conveyed by a trust deed of February 14, 1882, in which the object of the school was stated to be "to offer a religious, liberal, and useful education to girls on such terms as shall, as far as possible, make the school self-supporting, but without a view to any

ulterior profit." It was also provided by the same deed that it should be a permanent by-law of the institution as follows:—

"The head mistress shall be a member of the Church of England, and she shall, under the direction of the council (meaning the board of management of the school), make proper regulations for religious instruction to be given in the school in accordance with the doctrines of the Church of England as by law established; but the parent or guardian of, or person liable to maintain, or having the actual custody of any scholar may claim by notice in writing addressed to the head mistress the exemption of such scholar from attending prayer or religious worship. . . . ."

The new buildings were erected and the school opened on February 6, 1883. A scheme, dated June 19, 1900, was drawn up by the Charity Commissioners for the administration of the school. Under that scheme, by articles 3 to 5, the governing body was to consist of sixteen competent persons, of whom the one ex officio governor was to be the Lord Bishop of Chester for the time being, and there were eleven representative governors appointed by local bodies and trustees of charities, and four co-optative governors.

Article 34 provided as follows: "There shall be a head mistress of the school. She shall be a member of the Church of England, and shall have such qualification, or certificate, or other test of her attainments as may be fixed from time to time by any regulation of the governors approved by the Charity Commissioners. . . . ."

Article 54: "Subject to the provisions of this scheme religious instruction in accordance with the doctrines of the Church of England shall be given in the school under regulations to be made from time to time by the governors. No alteration in any such regulations shall take effect until the expiration of not less than one year after notice of the making of the alteration has been given by the governors in such manner as they think best calculated to bring the matter within the knowledge of persons interested in the school."

The average number of scholars attending the school since the institution of the scheme was 156 per year, and the fees payable

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varied from 9*l.* to 15*l.* 15*s.* per year for day scholars, and from 43*l.* 15*s.* to 51*l.* per year for boarders. The school was carried on at a loss. In 1906, upon the application of the governors, it was placed on the list of secondary schools by the Board of Education, and the deficits of 219*l.* for that year and of 521*l.* for 1907 were met by grants from the Board, who agreed to waive their existing regulations as a matter of indulgence. In 1909 new regulations for secondary schools were issued by the Board, and these provided, inter alia, 5 (*a*) that no catechism or formulary distinctive of any particular religious denomination should be taught in the school except as therein provided; (*b*) "If the instrument under which the school is governed requires, or does not prohibit, the giving in the school of religious instruction distinctive of any particular denomination, the governing body may provide such instruction for any pupil upon the written request of the parent or guardian of the pupil. A record must be kept of all such requests."

Article 23 provided that the instrument under which the school was governed must not require any members of the teaching staff to belong, or not to belong, to any particular denomination.

Article 24 provided that the governing body of the school must contain a majority of representative governors.

By article 45 the Board of Education had power, on failure of a school to fulfil any of the conditions of grant contained in the regulations, to withhold the grant, or to pay it with or without deductions.

The governors had now under consideration the erection of a new block of buildings, containing a laboratory for the teaching of science, a gymnasium, and additional class rooms, all of which were urgently needed for the educational efficiency of the school. Grants for this purpose to the amount of 4000*l.* had been promised by local authorities upon condition that the scheme was amended so as to render the school eligible for grants from the Board of Education.

In view of the fact that the school, which was carrying on an educational work of great value, could not continue to exist unless it received the contributions from the local authorities and

also earned the grants from the Board of Education, the governors unanimously desired to modify the existing scheme so as to secure these grants.

The suggested modifications of the scheme to meet the requirements of the Board were, in effect, three: (1.) to alter the number of governors, and the numbers to be appointed by various bodies, so as to secure a majority of representative governors; (2.) to eliminate the words in clause 34 requiring the head mistress to be a member of the Church of England; and (3.) to omit the second paragraph of clause 54, and substitute the words subsequently agreed upon and which appear below in the schedule to the minutes of order.

P. O. Lawrence, K.C., and *Fischer Williams*, for the petition. The law upon this question is to be found in the case of *Clephane* v. *Lord Provost of Edinburgh.* (1) The original object for which the school was founded has, in effect, failed, as it has been proved to be impossible to carry on the school without the grants from the Board of Education. What the proposed alteration in the scheme is intended to do is to carry out the views of the founder in the best possible way. The law is stated in Tudor on Charitable Trusts, 4th ed. p. 188.

Sir W. Robson, A.-G., and *Sargant*, for the Crown. The object of the school being to give a religious, liberal, and useful education to girls, that cannot be now effected, although the school has been administered with the greatest care and at the lowest possible expenditure consistent with efficiency. In cases of this character the Court has jurisdiction to alter the scheme where the primary object of the founder has failed, but that will be done only so far as is necessary to effect the real purpose of the trust. There must be something in the nature of failure in the true intent of the scheme to justify the Court, in the case of a modern charity, in making a new scheme. Where that is so, as in the present case, the Court can exercise its jurisdiction at once, and it is not necessary to wait until the school is about to be closed. The cyprès doctrine can be applied.

(1) (1869) L. R. 1 H. L. Sc. 417, 421.

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EVE J. This is a petition presented by the governors of the Queen's School, Chester, asking the Court to approve the introduction of certain modifications into the scheme of 1900 under which the school is now being managed.

I do not think one can read this petition and the evidence which supports it without mingled feelings of satisfaction and regret—satisfaction that the undertaking has prospered as it has prospered, and regret that its very prosperity has brought it to a position wherein it is necessary to choose (as it seems to me it is necessary to choose) between two alternatives—either to determine the carrying on of the school by reason of its inability to meet its liabilities, or to surrender part of its original constitution, the maintenance of which will prevent it from obtaining help from the only quarter to which it can now look for a sufficiency of help to enable it to carry on its work. The school was originally promoted in the year 1877 with the primary object of providing a means of education for the daughters of the middle classes in the city of Chester. The object of the school was to give to that class of children a thorough liberal and religious education. In order to give effect to what was proposed to be done it was necessary for those persons who were interested in the promotion to provide funds to meet the liabilities incurred in obtaining a suitable place, in securing the services of suitable teachers, and in giving the school a start. It was, in fact, started in the month of May, 1878, in a private house, situated in Watergate Street, held for the residue of a term, which had some three years unexpired, at a rent of 110*l.* a year.

The school prospered from the first in this sense, that it evidently supplied a want. It did not prosper in another sense, because at a very early stage it was found that the working was being carried on at a loss. It is true that the initial loss was made up, in part, of the necessarily heavy expenditure incurred in establishing the school, but still the deficit was apparent for some years after the school was started, and the treasurer's reports shewed a continuing debit balance. In that position of affairs one friend was found in the late Duke of Westminster, who came forward and offered a very eligible site for the erection

of new school buildings, and other friends were found who were willing at a very moderate rate of interest, and upon what at that time looked a somewhat insufficient security, to provide a portion of the moneys required for the purpose of erecting thereon the necessary buildings. The net result of this combination of help was that those interested in the conduct of the school felt themselves justified in appealing to the public for further assistance, and in the end a fund was accumulated, partly by means of subscriptions from the public and partly by means of the money borrowed upon mortgage, sufficient to enable the committee to erect on the site provided by the late Duke the new school buildings. In order to carry the arrangement through, the mortgage on the land was created prior to the conveyance of the land by the Duke to the trustees, and, that having been done, the land was on February 14, 1882, conveyed by the Duke to the trustees subject to the mortgage. The conveyance contains a statement of the objects of the school to be erected on the site and provisions with regard to the by-laws to be made for its management, and in particular a provision in reference to the qualifications of the lady who was to be appointed head mistress of the school.

It was thereby declared that "the object of the trust is to offer a religious, liberal, and useful education to girls on such terms as shall as far as possible make the school self-supporting, but without a view to any ulterior profit"; and after provisions for the making of by-laws in reference to the subjects to be taught, to the course of education, to the school fees and other matters incidental to the due working of the institution, and for the alteration from time to time of such by-laws, it was declared that the following by-law should be a permanent by-law of the institution, that is to say, a by-law which was not to be subject to the provisions regulating or providing for the alteration of the by-laws generally: "That the head mistress shall be a member of the Church of England, and she shall, under the direction of the council, make proper regulations for religious instruction to be given in the school in accordance with the doctrines of the Church of England as by law established." That by-law has been acted upon, and is being acted upon down to this day.

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The main object of this petition is to allow an alteration to be made in the existing scheme, the effect of which is to do away with that by-law. The school was built and opened in 1883. As time has gone on the council have found it necessary to raise the standard of education in order to keep the school in its proper position with regard to the elementary schools in the country. The result has been that increased expense has been incurred in providing not only a fully qualified and efficient staff, but all those adjuncts which are now so necessary for a complete secondary education. The fees payable by the pupils have been raised, and the salaries paid to the teachers have been kept at the lowest possible level. I am quite satisfied, on the evidence, as indeed the Attorney-General himself is satisfied, that this school has been administered with the greatest possible care, and with the single purpose of keeping it efficient at the lowest possible rate of expenditure. Although that has been done, and although every effort has been made to balance the expenditure and the receipts, unfortunately a state of things has arisen in which there has grown up, and there is still continuing, a permanent excess of expenditure over receipts. Although the scholars attending the school number on the average 156, and although the day scholars pay fees varying from 9*l.* to 15*l.* and the boarders, of whom there are twelve, pay fees varying from 43*l.* to 55*l.*, the income from all sources has in each of the last three years fallen considerably below the expenditure.

In these circumstances, and in view of this further circumstance that the time has arrived when it is necessary, in order to keep pace with the march of education, in part to reconstruct the school buildings, the governors are face to face with this difficulty. They cannot as honest men and women carry on this school on credit. It is not to be expected that they themselves can, even if they were willing for a time to do so, face the obligations and the difficulties which arise from carrying on an institution burdened with a constantly growing debt. I am told that it is not possible to raise the fees, and that, having regard to the limited scope of the charity, confined as it is to children of persons resident in Chester, it would be hopeless to expect an adequate response to an appeal for funds to provide

an endowment by means of voluntary subscriptions. In these circumstances the shutting up of the school and the discontinuance of its useful work is within measurable distance. The deficit is a growing one, and during the last three years has been met in this way. The Board of Education, notwithstanding that the scheme under which the school is at present managed contains regulations which are inconsistent with the regulations which must obtain if the Board is to make a grant in aid, has come forward, and, appreciating the good work which this school has been doing, has waived the existence of those regulations and has provided the money in order to meet the deficit, but on each occasion it has intimated, and if I may say so very properly intimated, that this state of things cannot be allowed to continue, and if the school is to be permanently assisted by Government grants it must bring its constitution into accordance with departmental requirements. The scheme under which the school is now being regulated, adopted in 1900, provides that the head mistress shall be a member of the Church of England. The Board of Education has indicated the minimum of change with which it will be satisfied, and that minimum involves the elimination of that provision from among the qualifications of the head mistress—that is to say, the Board requires that the head mistress, although she must be qualified in the various other respects indicated in clause 34 of the existing scheme, shall not be required to be a member of the Church of England. The governors, who, I doubt not, have considered this matter from every possible standpoint, have unanimously come to the conclusion that between the two alternatives of shutting up the school and surrendering that particular qualification of the head mistress the latter is the preferable one, and they now ask the Court to be allowed to abandon that qualification and to accede to the requirements of the Board of Education in that respect.

On the facts of this case, having regard to the unanimity of the governors and having further regard to this consideration, that the primary object of this charity cannot be given effect to if matters are allowed to continue as they are, I think I ought to accede to the prayer of the petition. When I say that I do so with

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regret. I am not meaning to say that this is not pre-eminently a case in which I think an order ought to be made, but I share with the governors the regret which I am quite sure they feel that the necessity has arisen for their introducing this change into the constitution. But this is a very modern charity established only some thirty years ago, and therefore, although I make the order, I propose to preface it by some words which will shew that I make it on the ground that the main object of the charity cannot be carried out under the existing constitution—in other words, I treat the case as one where the continuance of the charity under its existing constitution is proved to be impracticable, and where, therefore, the Court has to determine by what modifications in its constitution its continuance can be secured.

The minutes of Order, omitting formal parts, were as follows :—

And this Court being satisfied that it is impossible for the governors of the said Queen's School adequately to carry out the main object of the charity, namely the provision of a religious, liberal, and useful education for girls, unless the school is rendered capable of earning the Government grant in aid of secondary education, and sufficient modifications for that purpose are made in the scheme of the Charity Commissioners of the 19th day of June, 1900, under which the charity is now carried on Let the said scheme be modified in the manner shewn in the schedule hereto And let those of the present governors of the school who were respectively appointed by the dean and chapter of the cathedral church of Chester, by the governing body of the charity of Robert Oldfield, in the city of Chester, and by the trustees of the Hastings School Foundation, respectively, and also all the present co-optative governors forthwith retire from office And let the said scheme as so modified be carried into effect. . . . .

THE SCHEDULE ABOVE REFERRED TO.

Clauses of existing scheme of Charity Commissioners dated the 19th day of June, 1900.	Modifications therein.
[Clauses 3 and 5.]	[Alteration of the number of governors from 16 to 15, and other alterations in the number of representative governors to be appointed by various public bodies and trustees of charities, so as to secure a majority of representative governors.]

THE SCHEDULE ABOVE REFERRED TO—*continued.*

Clauses of existing scheme of Charity Commissioners dated the 19th day of June, 1900.	Modifications therein.
Clause 34.	Omit the words "shall be a member of the Church of England and".
Clause 54.	In place of the existing clause insert a new clause as follows:— "54. Subject to the provisions of this scheme religious instruction in accordance with the doctrines of the Church of England shall be given in the school under regulations to be made from time to time by the governors, but no catechism or formulary distinctive of that Church may be taught in the school except in cases where the parent or guardian of, or person liable to maintain, or having the actual custody of any scholar, requests the Governors in writing to provide for the scholar instruction in the doctrines of the Church of England. Save as aforesaid no catechism or formulary distinctive of any particular religious denomination may be taught in the school."

Solicitors: *Pritchard, Englefield & Co., for Mason & Moore Dutton, Chester; Treasury Solicitor.*

G. M.

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[1910 R. 192.]

Infant — Corporation — Membership — Local Act — Construction — "Any person"—Royal Naval School Act, 1840 (3 *Vict. c. lxxxvi.*), *s.* 3.

By an Act of 1840 (3 Vict. c. lxxxvi.) passed for the establishment and government of an institution called the Royal Naval School, it was provided by s. 3 that "any person" who should pay to the treasurer of the institution the amount therein fixed should be a member of the corporation. One of the defendants, on whose behalf the required subscription had been paid, was an infant and a pupil at the school, and voted at a meeting of the institution at which an important proposal affecting the future of the school was debated. Upon a summons raising the question whether the expression "any person" included an infant so that he could become a member of the corporation and vote at meetings:—

Held, that there being nothing in the statute in question to shew that the word "person" included an infant, and having regard to the fact that the corporation was formed for the establishment and management of a school, and that every member of the corporation was eligible for appointment to the council of the institution, the Legislature could not have intended that the membership of the corporation should include minors; and the infant, therefore, was not eligible as a member.

ADJOURNED SUMMONS.

This was an action by Admiral Sir Edward Hobart Seymour against the Royal Naval School and other defendants, the last of whom was Donald Gordon Rule, an infant under twenty-one and a pupil at the school situated at Eltham. On January 4, 1910, a subscription of 1*l.* 1*s.* was paid to the secretary by the father of the infant defendant on his behalf to qualify him to become a member of the corporation.

At a meeting of the institution held on January 5, 1910, an important proposal affecting the future of the school had been brought forward, and the defendant D. G. Rule voted upon it.

Various questions were raised upon the summons, but the only one which calls for a report was whether, upon the true construction of the Royal Naval School Act, 1840, and the by-laws

made under the powers therein contained, a person who, being an infant, had paid his subscription was entitled to vote at a meeting of the institution.

The provisions of the special Act bearing upon the question are taken from the judgment of the Court and are as follows: By an Act of Parliament passed in the year 1840 (3 Vict. c. lxxxvi.) for the establishment and government of the institution called "The Royal Naval School," after reciting that at a public meeting held in London on July 11, 1831, it was resolved that a school should be established for the education of the children of officers in the Royal Navy and Marines, to be called the Royal Naval School, and that the school was opened in the year 1833, and had since been and was then being carried on, and had been supported as well by voluntary subscriptions and donations as by certain other funds therein mentioned, and that experience had shewn that the said school had been of considerable advantage, and it was apprehended that its benefit would be greatly increased if it were established under proper regulations upon a permanent foundation, and if, for that purpose, the subscribers were incorporated and empowered to purchase lands and hereditaments, it was enacted that for establishing and well governing the said institution the individuals therein mentioned, all officers in Her Majesty's Royal Navy and Royal Marines, together with any person or persons, body or bodies politic, corporate, or collegiate, who had paid, or at any time thereafter should pay, into the hands of the treasurer for the time being of the said institution the sum of 10*l.* 10*s.* at any one time for the use of the said institution, and also every person who had paid, or at any time thereafter should pay, into the hands of such treasurer an annual sum of such amount as was thereinafter mentioned for the use of the said institution, should, during such time as he or she should continue to pay the same, and also every person who should be admitted, or appointed a member of the said institution by any general meeting of the corporation thereby created, should be, and they were thereby united into and declared to be, one body corporate and politic by the name of "The Royal Naval School," with the powers therein mentioned; and it was thereby further enacted by s. 2 that it should be

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lawful to and for the corporation from time to time to appoint a committee, to be called the council of the said institution, which council should have such or so many of the powers and authorities and discretion by that Act given to and vested in the corporation as the corporation should from time to time think proper to delegate to such council; and, by s. 3, that the annual sum, by the payment of which to the said treasurer as aforesaid any person was or should be a member of the said institution and corporation, should be of such amount as was in the said section mentioned; and, by s. 12, that the general meetings of the corporation should have full power to superintend, regulate, and control all the affairs and concerns of the said institution, and should have full power and authority from time to time to make such rules, orders, and by-laws as to them should seem proper for the nomination, selection, election, choice, and appointment of the patrons, vice-patrons, president, vice-presidents, council, directors, and members of the said institution, and the auditors, treasurer, secretary, officers, and servants of the said institution, and how and in what manner, and by whom, and when, and where, and how often, and on what occasions such nomination, selection, election, choice or appointment should be made, cease, determine, become void, be renewed, or filled up, and what should be the qualifications of the members of the said institution, and the number, qualifications, duties, businesses, and employments of such president, vice-presidents, council, directors, auditors, treasurer, secretary, officers, and servants, and the powers and meetings of the said council, and the manner of executing such powers and convening such meetings, and how, and in what manner, and when, and by whom, and where the general meetings of the corporation should be called, convened, and held, and who should attend and vote at such general meetings, and what business, matters, and things, and in what manner, should be transacted and done at such general meetings, and also for the good government of the institution, and for the governing, regulating, ordering, and managing the institution, and the officers, servants, and persons employed in and about the affairs thereof, and the applications and qualifications for admission to the school, and for auditing

the accounts of the institution, or otherwise relating thereto, and from time to time to alter and repeal such orders, rules, and by-laws, or any of them, and to make others.

The institution so established had been continued down to the present day. Its management under the existing by-laws, adopted in the year 1885, was in the hands of the council, consisting of the president, four of the vice-presidents, and twenty-four of the members of the corporation. The by-laws provided for the holding of ordinary general meetings of the members of the corporation annually, and of special general meetings when the council might think proper, or twelve or more members of the corporation might, by written requisition, require.

Dighton Pollock, for the plaintiff.

Owen Thompson, for the infant defendant. For the purposes of the registration of a company an infant is a "person": Companies (Consolidation) Act, 1908, s. 2; *In re Laxon & Co.* (1) An infant is also a person who can take a grant of Crown lands: *O'Shanassy* v. *Joachim* (2); *Rex* v. *Carter* (3); Kyd on Corporations, vol. i. p. 334. It would seem that in general infants cannot be members of a corporation: Grant on Corporations, p. 6. He may, however, be a shareholder in a company and be liable to pay calls: *Leeds and Thirsk Ry. Co.* v. *Fearnley.* (4) He may also be a member of a building society or a benefit society, and also an executor: Adler on Corporations, pp. 43, 44; Simpson on Infants, 3rd ed. pp. 40, 41, 91. But under the Municipal Corporations Act of 1882 (45 & 46 Vict. c. 50), s. 9, sub-s. ii. (*a*), a person shall not be entitled to be enrolled as a burgess unless he is of full age. The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 79, provides for the voting of a shareholder, who is a minor, by his guardian.

The question, therefore, is whether, if the defendant is entitled as an infant to be a member of a corporation, there is anything in the terms of the special Act of 1840 (3 Vict. c. lxxxvi.), or in the by-laws made under it, to prevent it. I submit not. As there is a council appointed under the 2nd section of the

(1) [1892] 3 Ch. 555.
(2) (1876) 1 App. Cas. 82.
(3) (1774) 1 Cowp. 220.
(4) (1849) 4 Ex. 26; 18 L. J. (Ex.) 330.

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Act to manage the school, the possible evil of an infant being a member of the corporation is reduced to a minimum.

H. W. Dollar, for the Royal Naval School.

Cur. adv. vult.

March 22. EVE J., after stating the terms of the Act of 1840 (3 Vict. c. lxxxvi.), and giving the effect of the by-laws, as set out above, continued:—At recent general meetings of the institution an important proposal affecting the future of the school has been debated, and the voting thereon has been so evenly divided as to lead both sides to investigate the qualifications, as members of the corporation, of several of those whose votes were recorded.

The investigation led to the launching of this summons, which has been issued for the purpose of obtaining the opinion of the Court upon several points affecting the claims to vote. I disposed at the hearing of all these points except that which raises the question whether an infant can be a member of the corporation and entitled to vote at its meetings. The particular infant whose case has been selected for argument is a pupil at the school, on whose behalf a subscription has been paid sufficient to make him a member of the corporation, were he of full age. Does the fact that he is not of full age disqualify him from membership or disentitle him to vote? The statutory enactment is that any person who shall pay into the hands of the treasurer an annual sum of the amount fixed by the statute—that is, in the case of the individual under consideration, the sum of 1*l.* 1*s.*—shall, during such time as he or she shall continue to pay the same, be a member of the body corporate. Does the expression "any person" include an infant?

The word "person," with or without the prefix "any," is to be found in numerous Acts of Parliament. The word may (*Pearks, Gunston & Tee, Ld.* v. *Ward* (1); *In re Thompson's Settlement Trusts* (2); *Hirst* v. *West Riding Union Banking Co.* (3)) or may not (*Walker* v. *Richardson* (4); *Pharmaceutical Society* v. *London and Provincial Supply Association* (5); *O'Duffy* v. *Jaffe* (6); *Mylam*

(1) [1902] 2 K. B. 1.
(2) [1905] 1 Ch. 229.
(3) [1901] 2 K. B. 560.
(4) (1837) 2 M. & W. 882.
(5) (1880) 5 App. Cas. 857.
(6) [1904] 2 I. R. 27.

v. *Market Harborough Advertiser Co.* (1)) include a corporation, or an incorporated company. It may (*In re Chisholm's Settlement* (2)) or may not include a woman or a married woman (*Hall* v. *Incorporated Society of Law Agents* (3)), and it has been held to include an infant under s. 6 of the Companies Act, 1862 (*In re Laxon & Co.* (4)) and an infant of mature years under the Crown Lands Alienation Act, 1861 (New South Wales) (*O'Shanassy* v. *Joachim* (5)). In the statute with which I am now dealing it in terms includes a woman—see the expression "he, or she, shall continue to pay" in s. 1, and the stipulation in s. 3 as to the annual sum to be paid by the widow of a deceased officer—and I think, from the wording of that part of s. 1 which deals with life membership, it also includes in subsequent parts of the Act a corporation, but there is nothing in the Act to shew that it includes an infant, nor, on the other hand, is there anything which expressly negatives it so doing.

In this state of circumstances I have to deal with very much the same question as was presented to the Court in the case of *Rex* v. *Carter*. (6) That was an information in the nature of a quo warranto against the defendant to shew by what authority he claimed to exercise the office of burgess of the borough of Portsmouth, seeing that at the time of his supposed election to be a burgess he was of the age of five years and ten months, and no more. The case was very elaborately argued, but Lord Mansfield commences his judgment thus (7): "A great variety of learning has been gone into on both sides, which seems to me unnecessary to be taken into consideration upon the present question; the decision of which depends upon a very short point." And then, after dealing with some of the learned arguments, he proceeds: "Let us see then what the true question is. This is a corporation which derives its constitution under a charter from the King, and their whole power arises from it It follows therefore that they are bound to act according to the powers and directions which it contains. The question then is, whether

(1) [1905] 1 K. B. 708.
(2) [1901] 2 Ch. 82.
(3) (1901) 38 Sc. L. R. 776.
(4) [1892] 3 Ch. 555.
(5) 1 App. Cas. 82.
(6) 1 Cowp. 220.
(7) 1 Cowp. 225, 226.

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the defendant in this case being elected at the age of five years old, and sworn in at twenty-one, is duly elected according to the terms of the charter? The whole depends upon the true construction of the charter. Mr. Davenport has said there may be inchoate rights, to be completed when the parties are of age; and cases have been alluded to of children born with a right to be admitted at twenty-one, on payment of a sum of money, and also titles by servitude or marriage. Clearly there may be such inchoate rights; but the question is, whether the King has by this charter given the corporation a power to grant inchoate rights to infants, to be put in execution upon their attaining the age of twenty-one? If he has not, there is an end of the defendant's title. Let us see then what the terms of the charter are. The King enables the mayor and aldermen, or the greater part of them, to choose as many burgesses as they shall think proper, and to administer to them the oath of office, and till sworn they are not complete burgesses. Upon an information they must be sworn in. Did the King mean, when he directed they should be sworn in, that they should swear in sucking infants? It is said a corporation may choose absent members: if fairly, and consistent with the charter, they may. But they cannot choose an absent member collusively; and in the case of Cambridge, the Court was of opinion that it was a fraudulent election. There is no more in this case than this, that the King has given them a power to choose and swear in burgesses; and the question is, whether he gave them a power to grant an inchoate right, when no oath could be administered to them. I am clearly of opinion that no such power is given by the charter." Aston J. said: "The question does not depend upon the capacity or incapacity of infants to take; but whether this corporation are empowered by their charter to grant inchoate rights to infants."

Mr. Kyd, in vol. 1 of his Law of Corporations at p. 336, observes that from the principles on which *Rex* v. *Carter* (1) was decided it may fairly be concluded that where neither the provisions of the charter, nor the usage of the corporation, expressly authorize the election of an infant into a corporate office he is

(1) 1 Cowp. 220.

not capable of being elected, "for," he adds, "in that case there was no negative provision on the subject." Mr. Grant would seem to adopt the same view (Grant on Corporations, p. 6), and it is probably the correct one. But even if the case falls short of establishing that general proposition, it undoubtedly is a clear authority for this, that the question is one of construction. So treating it, and bearing in mind that the corporation with which I am now dealing was formed for the establishment and management of a school, that every member of the corporation is eligible for appointment to the council of the institution, and further that "the law knows of no distinction between infants of tender and of mature years" (per Parke B. in *Morgan* v. *Thorne* (1)), I cannot bring myself to believe that the Legislature ever contemplated or intended that the membership of this corporation should include individuals drawn from that class of the community from which undoubtedly the pupils attending the school, and enjoying its benefits, would be drawn, that is to say, the class of minors. I hold, therefore, that an infant is not eligible as a member of the corporation.

Solicitors: *Allen & Son; Edward Heron Allen.*

(1) (1841) 7 M. & W. 400, 408.

G. M.

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April 8, 11.

In re ELFORD.
ELFORD *v.* ELFORD.

[1909 E. 1212.]

Will—Construction—Tenant for Life and Remainderman—Trust for immediate Conversion of a Business—No Power to postpone—Direction as to "all the income arising from my estate" until Conversion—Profits of Business—Capital or Income.

A testator devised and bequeathed the residue of his property, whether real or personal, to trustees, upon trust for sale and conversion at such times and in such manner as they should think fit, but as to his business carried on in Sicily that they should wind up and dispose of the same as soon as practicable after his death, and if possible within twelve months thereof. There was express power to postpone the conversion of any part of his property other than the business. He then gave his wife a life interest in the income of his estate, and, subject thereto, his infant daughter was entitled to the whole estate contingently on attaining twenty-one or being married. The will contained a subsequent declaration by the testator that "all the income arising from my estate" should, until conversion, be applied as if it were income arising from the proceeds of the conversion, no part thereof being liable to be retained as capital.

Upon a summons to determine whether the profits of the business earned since the testator's death should be treated as income or be divided between capital and income:—

Held, that the expression "all the income arising from my estate" included the profits arising from the business.

Held, further, that there was no sufficient ground for limiting the application of the clause giving to the tenant for life the income of unconverted property to that part of the estate which was subject to the discretionary power to postpone; and the widow was therefore entitled to the profits of the business.

In re Chancellor, (1884) 26 Ch. D. 42, and *In re Crowther*, [1895] 2 Ch. 56, followed.

Adjourned Summons.

By his will, dated January 27, 1903, Arthur Wade Elford, His Majesty's Vice-Consul for Catania in the island of Sicily, after bequeathing certain legacies, devised and bequeathed all the residue and remainder of his property, whether real or personal, movable or immovable, and wheresoever situate, unto his wife, Emily Elford, of Catania aforesaid, and Harold Langford Lewis, of 2, New Square, Lincoln's Inn, barrister (who were

subsequently appointed executors and were thereinafter called his trustees), upon trust that they should sell, call in, collect, and convert into money the said property and premises at such time or times and in such manner as they should think fit, "but as to the business carried on by me in Sicily, that they shall wind up and dispose of the same as soon as practicable after my death, and if possible within twelve months thereof," provided that they should have the fullest power and discretion to postpone the sale, calling in, or conversion of the whole or any part or parts of his said property, other than the said business, without being responsible for loss. The testator then provided for the investment of the money produced by the conversion, and directed the trustees to pay the income of the residuary trust estate to his wife, Emily Elford, during her widowhood, and after her death or remarriage the trustees were to stand possessed of the trust premises and the investments representing the same in trust for all or any the children or child of the testator living at the death or remarriage of his wife, who being male should attain twenty-one, or being female should attain that age or marry. And the testator gave the following direction in the subsequent part of his will:—"I declare that all the income arising from my estate shall, until conversion, be applied as if the same were income arising from the proceeds of such conversion, no part thereof being liable to be retained as capital."

The testator died on October 4, 1907, leaving his widow, the defendant Emily Elford, and one child only, the plaintiff Margherita Susanna Maria Elford, who was an infant. The other executor and trustee of the will, Harold Langford Lewis, was made a defendant.

The question raised upon the summons, dated December 3, 1909, was whether, upon the true construction of the will, the profits earned since the testator's death by carrying on his business in Catania should be treated as income and paid to the defendant Emily Elford as tenant for life, or be divided between capital and income by attributing to income only a sum equal to 3 per cent. on the value of such business as at the testator's death. There was evidence that the executors and trustees had used their best endeavours to dispose of the business

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at Catania, but it had not been found practicable as yet to wind it up. The profits made in the business were considerable.

Ingpen, K.C., and *F. Guthrie-Smith*, for the infant entitled in remainder. There must be apportionment of the profits of the business as between capital and income on the principle of *In re Earl of Chesterfield's Trusts.* (1) Upon the true construction of the will we submit that the profits from the business are not income arising from the testator's estate. They are the product of the combined use of the testator's capital and the skill and exertions of the executors in conducting the business. The testator never contemplated that the business would be carried on.

Further, in cases where there is a trust for immediate conversion, and no power of postponement, the clause giving a tenant for life the profits and income until conversion is not put in and is inapplicable. It is a proper and usual direction to insert where there is power to postpone conversion: *Brown* v. *Gellatly.* (2) In the present case the direction only applies to the property as to which there is express power to postpone conversion. The proper course, therefore, is to ascertain the value of the business as at the date of the testator's death, and allow the tenant for life 3 per cent. on that sum.

Jessel, K.C., and *L. Mossop*, for the tenant for life. On the first point of construction the words of the testator are plain; "the income" arising from his estate must include everything. It is the widest term possible. The profits of the business are income from the capital employed in this business. He contemplates in his will that it may not be wound up within twelve months, and directs that all the income of the unconverted estate shall go to the tenant for life.

On the second point there appears to be no case exactly like the present, where the clause as to intermediate profits in respect of property directed to be sold is unusual. But it is open to any testator to provide that if the immediate conversion which he has directed is impracticable, the income of such estate, until converted, may be paid to the tenant for life. That is, in effect, what this testator has directed here, and it has been

(1) (1883) 24 Ch. D. 643. (2) (1867) L. R. 2 Ch. 751.

proved that the sale of the business has not been practicable up to the present. In *Hope* v. *D'Hédouville* (1), where there was no power to postpone conversion and no direction as to the interim rents, the rents were nevertheless held to belong to the tenant for life.

In the present case there is an implied power to retain the business, but not for an indefinite time: *In re Smith* (2); *In re Chancellor.* (3) Once that is established, the gift of the income to the tenant for life carries all the profits of the business.

J. F. R. Stainer for the trustees of the will.

Ingpen, K.C., in reply, referred to *In re Oliver* (4), where a distinction was drawn between real and personal estate.

Cur. adv. vult.

April 11. EVE J. The testator died on October 4, 1907. At the time of his death he was engaged in business in Catania, in Sicily, as a coal and general merchant, the capital employed by him in such business amounting to a sum of between 22,000*l.* and 23,000*l.* For the year ending on September 30 immediately preceding his death the profits of the business amounted to 1721*l.*; for the years ending September 30, 1908 and 1909 respectively, they have reached 2100*l.* and 3000*l.*

This summons has been issued for the purpose of determining how, as between tenant for life and remainderman, the profits of the business since the testator's death ought to be applied. The tenant for life is the testator's widow; the person entitled in remainder is the testator's only daughter, an infant who, subject to her mother's life interest, is entitled to the whole estate contingently on attaining twenty-one or being married.

The question turns upon two clauses in the testator's will, which bears date January 27, 1903. [His Lordship read the residuary devise and bequest and the declaration as to the income arising from the estate, and continued:—]

On behalf of the infant it has been argued that, on the true construction of this will, the clause containing the direction as to

(1) [1893] 2 Ch. 361.
(2) [1896] 1 Ch. 171.
(3) 26 Ch. D. 42.
(4) [1908] 2 Ch. 74.

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the income arising from the estate does not extend to the profits earned in the business, first, because such profits cannot be properly described as "income arising from the estate" in that although, in one sense, produced by the investment in the business of part of the estate, they are really brought into existence by the executors' conduct and carrying on of the business, and are, in that sense, the product of the combined use of the testator's capital and the exertions of the executors; and, secondly, because the clause giving a tenant for life the income of unconverted property is the usual appendage to a trust for conversion, with a superadded power to postpone, but is not recognized as a usual or, indeed, as an appropriate appendage to a trust for immediate conversion. At the same time it is not contended that it is not open to a testator to direct an immediate conversion, and to provide that, if such immediate conversion is impracticable, the income of the estate, so long as it remains unconverted, is to be paid to the tenant for life, and on behalf of the widow it is urged that this is what the testator in this case has done.

In my opinion, as a matter of construction, the expression "all the income arising from my estate" includes the profits arising from the business. Such profits represent the income accruing to the testator's estate from and by way of interest on his capital invested in the business, and although they are, no doubt, the product of the combined use of his capital and of the executors' skill, they after all represent the return coming to his estate from the use of his money.

I think, too, the point is covered by authority. Sir George Jessel in *In re Huggins* (1) says that the word "income" is "as large a word as can be used" to denote a person's receipts. In *In re Chancellor* (2) the Court of Appeal held a tenant for life, by virtue of a gift of "the rents, profits, and income" accruing from unsold realty and unconverted personalty, to be entitled to the profits of a business retained unconverted for two years under a power to postpone. And in *In re Crowther* (3) Chitty J., in like manner, treated the profits of a business as

(1) (1882) 51 L. J. (Ch.) 935, 938. (2) 26 Ch. D. 42.
(3) [1895] 2 Ch. 56.

included in a gift not of "the rents, profits, and income," but of "the income accruing" from unsold realty and unconverted personalty.

On the first point, therefore, I do not think that the argument on behalf of the infant ought to prevail.

As to the second point, the evidence satisfies me that the business has been retained solely because the trustees have hitherto found it impracticable to dispose of it. I think that the will shews that the testator clearly contemplated the possibility of such a contingency, and I do not see any sufficient grounds for limiting the application of the clause giving to the tenant for life the income of unconverted property, in terms which I have just held to be wide enough to include the profits of the business, to that part of the estate which is subject to the discretionary power to postpone. I think that the testator has shewn that he intends the income of the whole of his unconverted estate for the time being to be paid to the tenant for life, and accordingly I declare the widow to be entitled to the profits, and I direct the costs of all parties to be taxed as between solicitor and client and paid and retained out of the capital of the testator's residuary estate.

Solicitors: *Stokes & Lewis; C. J. Parker.*

G. M.

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ADMINISTRATION — *Annuity — Pecuniary Legacies—Deficiency of Assets—Valuation of Annuity—Right of Annuitant to Payment of Amount.*

Testatrix by her will, after giving certain pecuniary legacies, bequeathed to her husband an annuity of one pound a week during his life, and directed her trustees to appropriate and set apart and invest such sum of money as would when invested produce by the income thereof an annual sum equal to the amount of the annuity and to apply the income or (if necessary) the corpus of the fund so appropriated in payment of the annuity, which sum should on the dropping of the annuity fall into and form part of her residuary trust estate. And she devised and bequeathed the residue of her real and personal estate to her trustees upon trust for sale and conversion and payment of her debts, funeral and testamentary expenses, and legacies, and to invest the moneys which should remain in certain investments, and to hold such investments upon certain trusts for the benefit of her son.

The estate of the testatrix was insufficient to pay the pecuniary legacies and to set apart a sum sufficient to answer the annuity to her husband in full. It was, however, sufficient to pay the pecuniary legacies and the value of the annuity as at the date of her death :—

Held, that the proper course for the trustees to adopt was to value the annuity as at the date of the death of the testatrix according to the Government scale and to pay the amount of such valuation to the annuitant or invest it in the purchase of an annuity, as he should choose, and to pay the pecuniary legacies in full.

Wright v. *Callender*, (1852) 2 D. M. & G. 652, applied. *In re* COTTRELL. BUCKLAND *v.* BEDINGFIELD - - **Warrington J. 402**

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2. —— *Executor — Imperfect Gift of Personalty — Indefinite Gift—Promise to pay in the Future — Continuing Intention to Give — Donee appointed one of Donor's Executors—Perfected Gift.*

The plaintiff lived with and kept house for her father, and frequently asked him to pay her a salary as housekeeper. In 1902 he gave her a document, whereby he declared that from and after September 30, 1902, she should receive from his business 2*l.* per week, or about fifty-two sums of equal amount per annum, and also an additional sum of 2*l.* a week, to remain in the business and to be withdrawn by her, if necessary, after an investment lasting for five years, with increase of 5 per cent. per annum. The 2*l.* a week was never paid, but she received from her father various sums amounting to 78*l.* 10*s.* In 1905, at his request, she gave back the document so that he might consult a solicitor about it and see that there should be no doubt of her getting the money ; and she found it amongst his papers after his death. By his will the father appointed the plaintiff to be an executrix and directed that his estate should be equally divided between his children.

The plaintiff issued this summons for a declaration that she was entitled as a creditor to have the amounts specified in the document paid to her out of the estate, or that her father had constituted himself a trustee of the property specified in the document, or, thirdly, that the gift of the document coupled with her appointment as executrix was a complete gift of the amounts specified in the document :—

Held, on the evidence, that the plaintiff was not a creditor of the testator's estate in respect of the sums mentioned in the document ; that the testator had not constituted himself a trustee of them for her ; and, on the third point, that

ADMINISTRATION—*continued.*

the rule laid down in *Strong* v. *Bird*, (1874) L. R. 18 Eq. 315, and extended by *In re Stewart*, [1908] 2 Ch. 251, ought not to be further extended so as to be applicable to a mere promise to pay an indefinite sum at a future time. *In re* INNES. INNES *v.* INNES **Parker J. 188**

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ADVOWSON—*Union of Benefices—Single Patron—Act of Union—No Provision for alternate Presentation—Order of Exchange—Grant of old Advowson—Construction.*

By an act of union or deed of consolidation, dated in 1738, the rectory and parish of P. were incorporated with the vicarage and church of D. to all intents and purposes in law whatsoever, constituting and appointing the church of D. to be the mother church to which (together with the rectory of P.) all future incumbents should be promoted, instituted, and inducted. At the date of the union there was only one patron of the two benefices, and no provision was made by the deed for alternate presentation or otherwise. By an order of exchange made in 1890 by the Board of Agriculture under the Inclosure Acts, 1845 to 1878, and the Board of Agriculture Act, 1889, certain lands and hereditaments in the two parishes, including "the advowson of the vicarage of D.," were ordered to be exchanged:—

Held, affirming the decision of Neville J., that after the union the old advowsons ceased to exist, and that what passed by the order of exchange under the description of "the advowson of the vicarage of D." was the advowson of the new united benefice of D.-cum-P.

Robinson v. *Marquis of Bristol*, (1851) 11 C. B. 241, distinguished. LORD ELCHO *v.* ANDREWS – – – – – **C. A. 706**

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Applied by Neville J. SLAZENGER & SONS *v.* SPALDING & BROTHERS
[1910] 1 Ch. 257

—— *Ellis's Settlement, In re*, [1909] 1 Ch. 618
Followed by Eve J. *In re* PLUMPTRE'S MARRIAGE SETTLEMENT
[1910] 1 Ch. 609

—— *Fitzgerald, In re*, [1904] 1 Ch. 573, 587
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Fletcher* v. *Fletcher* – (1844) 4 Hare, 67
Distinguished by Eve J. *In re* PLUMPTRE'S MARRIAGE SETTLEMENT
[1910] 1 Ch. 609

—— *Freman* v. *Whitbread*, (1865) L. R. 1 Eq. 266
Distinguished by Warrington J. *In re* SIR ROBERT PEEL'S SETTLED ESTATES
[1910] 1 Ch. 389

—— *Frewen, In re* – (1888) 38 Ch. D. 383
Dicta in, considered and distinguished by Eve J. *In re* DUKE OF MANCHESTER'S SETTLEMENT
[1910] 1 Ch. 106

—— *General Billposting Co.* v. *Atkinson*, [1909] A. C. 118.
Principle of, applied by Joyce J. MEASURES BROTHERS, LIMITED *v.* MEASURES – – **[1910] 1 Ch. 336**

—— *Glasdir Copper Mines, Limited, In re*, [1906] 1 Ch. 365, 384.
Dictum of Cozens-Hardy L.J. in, followed by Warrington J. *In re* A. BOYNTON, LIMITED **[1910] 1 Ch. 519**

—— *Glory Paper Mills Co., In re*, [1894] 3 Ch. 473.
Applied by Eve J. GRUNDY *v.* BRIGGS
[1910] 1 Ch. 444

—— *Gonty and Manchester, Sheffield, and Lincolnshire Ry. Co., In re*, [1896] 2 Q. B. 439.
Applied by C. A. SOUTH EASTERN RAILWAY COMPANY *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED – **[1910] 1 Ch. 12**

—— *Goy & Co., In re*, [1900] 2 Ch. 149, 153
Applied by Swinfen Eady J. *In re* RHODESIA GOLDFIELDS, LIMITED
[1910] 1 Ch. 239

—— *Griffiths* v. *Vezey* – [1906] 1 Ch. 796
Form of order in, observed upon by Joyce J. SHUTTLEWORTH *v.* CLEWS
[1910] 1 Ch. 176

—— *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202, 207.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

CASES—*continued.*

—— *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation*, (1891) 63 L. T. 834.
Followed by Neville J. WILLMOTT *v.* LONDON ROAD CAR COMPANY
[1910] 1 Ch. 754

—— *Harwood, In re* – (1882) 20 Ch. D. 536
Approved by C. A. *In re* DEHAYNIN
[1910] 1 Ch. 223

—— *Hicks* v. *Powell* – (1869) L. R. 4 Ch. 741
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Holthausen, Ex parte*, (1874) L. R. 9 Ch. 722
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Hopkinson* v. *Rolt* – (1861) 9 H. L. C. 514
Discussed by C. A. DEELEY *v.* LLOYDS BANK – – – [1910] 1 Ch. 648

—— *Hutton* v. *West Cork Ry. Co.*, (1883) 23 Ch. D. 654, 671.
Principles stated in, discussed and applied by Swinfen Eady J. CYCLISTS' TOURING CLUB *v.* HOPKINSON
[1910] 1 Ch. 179

—— *Hyam's Case* – –(1859) 1 D. F. & J. 75
Discussed and explained by C. A. *In re* DISCOVERERS FINANCE CORPORATION, LIMITED. LINDLAR'S CASE
[1910] 1 Ch. 312

—— *Imray* v. *Oakshette* – [1897] 2 Q. B. 218
Followed by Parker J. MATTHEWS *v.* SMALLWOOD – – [1910] 1 Ch. 777

—— *Jacobs* v. *Crédit Lyonnais*, (1884) 12 Q. B. D. 589, 600.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Jenkins* v. *Price* – – [1907] 2 Ch. 229
Referred to by Eve J. EVANS *v.* LEVY
[1910] 1 Ch. 452

—— *Joseph Crosfield & Sons, Ld., In re*, [1910] 1 Ch. 118.
Affirmed by C. A. – [1910] 1 Ch. 130

—— *Knatchbull's Settled Estate, In re*, (1884) 27 Ch. D. 349.
Dicta in, considered and distinguished by Eve J. *In re* DUKE OF MANCHESTER'S SETTLEMENT
[1910] 1 Ch. 106

—— *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 551
The rule in, applied by Joyce J. *In re* CURRIE'S SETTLEMENT
[1910] 1 Ch. 329

—— *Lloyd* v. *Guibert*, (1865) L. R. 1 Q. B. 115, 120, 122.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

CASES—*continued.*

—— *London and South Western Ry. Co.* v. *Gomm*, (1882) 20 Ch. D. 562.
Explained and distinguished by C. A. SOUTH EASTERN RAILWAY COMPANY *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED
[1910] 1 Ch. 12

—— *Lund's Case* – – (1857) 27 Beav. 465
Overruled by C. A. *In re* DISCOVERERS FINANCE CORPORATION, LIMITED. LINDLAR'S CASE – [1910] 1 Ch. 312

—— *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.*, [1892] 2 Ch. 303.
Applied by Swinfen Eady J.
[1910] 1 Ch. 354

—— *Missouri Steamship Co., In re*, (1880) 42 Ch. D. 321.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Monypenny* v. *Dering*, (1852) 2 D. M. & G. 145.
Followed by C. A. *In re* NASH
[1910] 1 Ch. 1

—— *Nash, In re* – – – (1894) 71 L. T. 5
Followed by Parker J. *In re* WINN
[1910] 1 Ch. 271

—— *Nash, In re. Cook* v. *Frederick*, [1909] 2 Ch. 450
Affirmed by C. A. – [1910] 1 Ch. 1

—— *Noakes & Co.* v. *Rice* – [1902] A. C. 24, 34
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Nottidge* v. *Dering. Raban* v. *Dering*, [1909] 2 Ch. 647.
Affirmed by C. A. – [1910] 1 Ch. 297

—— *Oliver's Settlement, In re*, [1905] 1 Ch. 191
Approved and followed by C. A. *In re* NASH – – – [1910] 1 Ch. 1

—— *Partridge* v. *Partridge* – [1894] 1 Ch. 351
Applied by Warrington J. *In re* EDWARDS – – [1910] 1 Ch. 541

—— *Pearce* v. *Watts*, (1875) L. R. 20 Eq. 492
Explained and distinguished by C. A. SOUTH EASTERN RAILWAY COMPANY *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED
[1910] 1 Ch. 12

—— *Peninsular and Oriental Steam Navigation Co.* v. *Shand*, (1865) 3 Moo. P. C. (N. S.) 272, 292.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Penn* v. *Baltimore* (*Lord*), (1750) 1 Ves. Sen. 444; 1 W. & T. L. C. (7th ed.), p. 755.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

CASES—*continued.*

—— *Pigot* v. *Cubley*, (1864) 15 C. B. (N. S.) 701
Explained by C. A. STUBBS *v.* SLATER
[1910] 1 Ch. 632

—— *Pollard, Ex parte*, (1840) Mont. & Ch. 239; 4 Deac. 27.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Riche* v. *Ashbury Railway Carriage and Iron Co.*, (1874) L. R. 9 Ex. 224, 263, 292.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Rishton* v. *Cobb*, (1839) 5 My. & Cr. 145
Distinguished by C. A. *In re* MASON
[1910] 1 Ch. 695

—— *Robinson* v. *Bristol* (*Marquis of*), (1851) 11 C. B. 241.
Distinguished by C. A. LORD ELCHO *v.* ANDREWS – – [1910] 1 Ch. 706

—— *Rose* v. *Poulton*, (1831) 2 B. & Ad. 822
Explained by Warrington J. ELLIS *v.* KERR – – – [1910] 1 Ch. 529

—— *Samuel* v. *Jarrah Timber and Wood Paving Corporation*, [1904] A. C. 323.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Sanderson* v. *Cockermouth and Workington Ry. Co.*, (1849) 11 Beav. 497; (1850) 2 H. & T. 327, 331.
Applied by C. A. SOUTH EASTERN RAILWAY COMPANY *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED – [1910] 1 Ch. 12

—— *Saunders, In re* – – [1898] 1 Ch. 17
Applied by Joyce J. *In re* COXWELL'S TRUSTS – – – [1910] 1 Ch. 63

—— *Sarill Brothers v. Bethell*, [1892] 2 Ch. 523
Explained and distinguished by C. A. SOUTH EASTERN RAILWAY COMPANY *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED
[1910] 1 Ch. 12

—— *Scholefield* v. *Redfern*, (1863) 2 Dr. & Sm. 173.
Distinguished by Warrington J. *In re* SIR ROBERT PEEL'S SETTLED ESTATES
[1910] 1 Ch. 389

—— *Scottish Economic Life Assurance Society, Ex parte*, (1890) 45 Ch. D. 220.
Followed by Eve J. *In re* LIFE AND HEALTH ASSURANCE ASSOCIATION, LIMITED – – [1910] 1 Ch. 458

—— *Scrope* v. *Offley*, (1736) 1 Bro. P. C. 276
Distinguished by C. A. NOTTIDGE *v.* DERING – – [1910] 1 Ch. 297

—— *Shepheard* v. *Beetham*, (1877) 6 Ch. D. 597
Distinguished by Warrington J. *In re* PULLEN – – – [1910] 1 Ch. 564

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—— *Small* v. *Smith*, (1884) 10 App. Cas. 119, 129
Principles stated in, discussed and applied by Swinfen Eady J. CYCLISTS' TOURING CLUB *v.* HOPKINSON
[1910] 1 Ch. 179

—— *Smith* v. *Dimes* – – (1849) 4 Ex. 32
Followed by Neville J. *In re* WILDE
[1910] 1 Ch. 100

—— *Solomons* v. *Pender*, (1865) 3 H. & C. 639
Principle of, applied by Neville J. STUBBS *v.* SLATER – [1910] 1 Ch. 195

—— *Spickernell* v. *Hotham*, (1854) Kay, 669
Followed by Eve J. *In re* PLUMPTRE'S MARRIAGE SETTLEMENT
[1910] 1 Ch. 609

—— *Stewart, In re* – – [1908] 2 Ch. 251
Discussed by Parker J. *In re* INNES
[1910] 1 Ch. 188

—— *Stone* v. *Liverpool Marine Society*, (1894) 63 L. J. (Q.B.) 471.
Applied by Warrington J. COX *v.* HUTCHINSON – – [1910] 1 Ch. 513

—— *Strong* v. *Bird* – (1874) L. R. 18 Eq. 315
Discussed by Parker J. *In re* INNES
[1910] 1 Ch. 188

—— *Stubbs* v. *Slater* – – [1910] 1 Ch. 195
Reversed in part and affirmed in part by C. A. – – – [1910] 1 Ch. 632

—— *Sutton's Hospital Case*, (1612) 10 Rep. 1a, 30b.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Taunton* v. *Royal Insurance Co.*, (1864) 2 H. & M. 135, 141.
Principles stated in, discussed and applied by Swinfen Eady J. CYCLISTS' TOURING CLUB *v.* HOPKINSON
[1910] 1 Ch. 179

—— *Union Bank of Manchester* v. *Beech*, (1865) 3 H. & C. 672.
Followed by C. A. PERRY *v.* NATIONAL PROVINCIAL BANK OF ENGLAND
[1910] 1 Ch. 464

—— *Ward* v. *Eyre* – (1880) 15 Ch. D. 130
Distinguished by Neville J. *In re* WILDE – – – [1910] 1 Ch. 100

—— *Wenlock* (*Baroness*) v. *River Dee Co.*, (1883) 36 Ch. D. 675, n., 685, n.
Applied by Swinfen Eady J. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED
[1910] 1 Ch. 354

—— *Wild* v. *Woolwich Borough Council*, [1909] 2 Ch. 287.
Affirmed by C. A. – [1910] 1 Ch. 35

—— *Wild's Case* – – (1599) 6 Rep. 16b
Discussed by Joyce J. *In re* JONES
[1910] 1 Ch. 167

—— *Wilkinson* v. *Malin*, (1832) 2 Tyrw. 544, 571.
Applied by Eve J. *In re* WHITELEY
[1910] 1 Ch. 600

CASES *–continued.*

—— *Willé* v. *St. John* – – [1910] 1 Ch. 84
Affirmed by C. A. – [1910] 1 Ch. 325
See also WILLÉ *v.* ST. JOHN
[1910] 1 Ch. 701

—— *Wright* v. *Callender*, (1852) 2 D. M. & G. 652.
Applied by Warrington J. *In re* COTTRELL – – [1910] 1 Ch. 412

CHARITY—*Hospital—Legacy "to found a bed in a hospital"—Endowment—Will—Construction.*

A testator gave a legacy of 1000*l.* "to the Belgrave Hospital to found a bed there to be called 'the Eleanor bed'" :—

Held, that the 1000*l.* must be invested and the income only applied towards maintaining the bed. ATTORNEY-GENERAL *v.* BELGRAVE HOSPITAL – – – **Swinfen Eady J. 73**

2. —— *Livery Company of City of London, Gift to—Devise for General Purposes of Company—Authority to Company or Trustees to make Scheme for Administration of "Charity hereby created."*

Property was devised to trustees in fee simple, upon trust for and to be held by the Masters, Wardens, and Commonalty of the Butchers' Company of the city of London "for the general purposes of the said company." The testator authorized the company or the trustees "to make and formulate any scheme, rules, regulations, bye-laws, or trusts for the temporary or permanent administration of the charity hereby created," and gave other directions applicable to a charitable bequest :—

Held, that the gift was not a charitable gift, and that the company was entitled (subject to obtaining the proper licence) to have the property conveyed for the general purposes of the company free from any charitable trust.

Livery companies of the city of London are not, unless there is something special in their charters, charities in any legal sense of the word. *In re* MEECH'S WILL. BUTCHERS' COMPANY *v.* RUTLAND – – – – **Parker J. 426**

3. —— *"Medical Charity or Charities" in Scotland—Administration—Scheme — Construction—Application of Income—Charity out of Jurisdiction.*

A scheme sanctioned by the Court for the administration of a charity provided that the income of the charity should be applied for the benefit of a particular hospital in England "or such other medical charity or charities of any kind, school, or teaching whatsoever, and partly or exclusively to one or other of such objects as the trustees may in their uncontrolled discretion from time to time determine." The trustees desired to apply the income to medical charities in Scotland :—

Held, that the charity must be administered and the trusts of the scheme carried into effect within the jurisdiction of the Court, and that the income could be applied to a "medical charity or charities" in Scotland. *In re* MIRRLEES' CHARITY. MITCHELL *v.* ATTORNEY-GENERAL **Joyce J. 163**

CHARITY—*continued.*

4. —— *School—Scheme—Religious Instruction—Government Grant—Board of Education—Modification of Scheme to meet Regulations of Board—Jurisdiction—Charitable Trust.*

Where the primary object for which a secondary school was originally founded cannot be given effect to under its existing constitution without the aid of grants from the Board of Education, the Court will modify the scheme of the Charity Commissioners under which the school was being administered, so far as necessary to comply with the regulations of the Board of Education and enable the school to secure the grants. *In re* QUEEN'S SCHOOL, CHESTER **Eve J. 796**

5. —— *Site for School—Gift of Land for Education of Poor—Discontinuance of Weekday School—Continued use as Sunday School—Cesser of Use for Purposes of the Act—Reverter—School Sites Act*, 1841 (4 & 5 *Vict. c.* 38), *s.* 2.

The expression "ceasing to be used for the purposes in this Act mentioned" in the reverter clause contained in s. 2 of the School Sites Act, 1841, means "ceasing to be used for such of the purposes in this Act mentioned as are specified in the deed of grant."

In 1868 S. executed a deed poll under s. 2 of the School Sites Act, 1841, conveying to the minister and churchwardens of a parish a piece of land for the purposes of the Act and upon trust to permit the premises and all buildings to be erected thereon to be used as a school for the education of children and adults of the poorer classes of the parish and for no other purpose. The schools were to be open to the inspection of the Established Church inspectors and managed by the principal minister of the parish, who was to superintend the religious and moral instruction of the scholars and might use the premises for a Sunday school. A school was erected on the land and used till 1907 as a public elementary school, when it ceased to be used except as a Sunday school. S. claimed that the premises had reverted to him under the Act; the Board of Education contended that they were still devoted to charity and that a scheme ought to be settled for the future administration thereof :—

Held, that inasmuch as the school had ceased to be used for the purposes specified in the deed poll it had reverted to the estate of S., the donor, although it had been continuously used for other purposes specified in the Act. ATTORNEY-GENERAL *v.* SHADWELL – **Warrington J. 92**

—— "Site"—Trustees—Decision of majority binding minority—Charitable trust
See WILL. 3. **600**

—— Will—Absolute gift—Codicil directing use of legacy for charitable purposes—Precatory trust—"I wish" – – **215**
See WILL. 1.

—— Will—Absolute gift—Gift on condition—Precatory trust for charity—"I specially desire" – – – – **219**
See WILL. 2.

CHARTERED COMPANY—Breach of charter—Ultra vires – – – – 354
See CONFLICT OF LAWS.

CLASS—"Next of kin whoever they may be"—Will—Construction – – – 278
See WILL. 4.

COAL MINES.
See under MINES.

CODICIL—Absolute gift—Codicil directing use of legacy for charitable purposes—Precatory trust—"I wish" – – 215
See WILL. 1.

—— Revocation — Will and codicil — Construction—Implied revocation – 681
See WILL. 7.

COMMISSION—Broker and client—Purchase of shares—"Net" charge—Secret profit
See STOCK EXCHANGE. 632

COMMON LANDS — *Lands taken for Public Undertaking—Compensation for Extinguishment of Commonable Rights — Payment to de facto Committee—Application by Committee to Board of Agriculture and Fisheries—Dispute as to proper Constitution of Committee — Action to determine Persons interested in Compensation—Jurisdiction of Court—Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 102, 103—*Inclosure Act*, 1852 (15 *&* 16 *Vict. c.* 79), *s.* 22—*Inclosure Act*, 1854 (17 *&* 18 *Vict. c.* 97), *ss.* 15, 16, 17—*Commonable Rights Compensation Act*, 1882 (45 *&* 46 *Vict. c.* 15).

Where under the Lands Clauses Consolidation Act, 1845, and the Inclosure Acts, 1852 and 1854, common lands have been taken for a public undertaking and a committee of commoners has been appointed to receive and has received the compensation payable in respect of the extinguishment of commonable rights, the Board of Agriculture and Fisheries have jurisdiction to entertain an application by the committee under s. 22 of the Act of 1852, without entering into any question as to the appointment or constitution of the committee. It is sufficient that the committee is a de facto committee.

A motion in an action against a de facto committee of commoners by persons suing on behalf of themselves and all other commoners for payment into Court of compensation money in the hands of the committee on the ground that such committee was not properly constituted was dismissed for want of jurisdiction. SALMON *v.* EDWARDS – – – **Warrington J. 552**

COMMONABLE RIGHTS COMPENSATION ACT, 1882 – – – – – 552
See COMMON LANDS.

COMPANY—*Debenture—Stockholder's Action—Distribution of Fund in Court — Company in Liquidation—Debenture Stock Trust Deed—No Condition protecting Transferees against Equities—Stockholder a Trustee and Director—Alleged Debt by Stockholder to Company—Retention of Shares of Stockholder and his Transferees.*

Where a trust fund is being distributed by the Court, a trustee-beneficiary against whom proceedings are pending for moneys alleged to belong to the fund cannot take any share until the amount (if any) due from him has been ascertained and made good.

After the appointment of a receiver in a debenture stockholder's action and a winding-up order, a stockholder, who was also a trustee of the deed securing the stock and a director, transferred 10,000*l.* stock to certain transferees.

The certificate in the action found that 250*l.* stock belonged to the transferor and 10,000*l.* to the transferees.

Among the assets certified as now subject to the trust deed was a debt alleged to be owing by the transferor to the company for moneys alleged to have been had and received by him while a director.

Proceedings were being taken to establish this alleged debt, but the amount (if any) due was not yet ascertained or established.

The trust deed did not contain any condition protecting the transferees from any equity, set-off, or cross-claim of the company against the transferor.

The fund in Court realized in the action was more than sufficient to pay the stockholders in full, and it was proposed to distribute it on the further consideration:—

Held that, pending the ascertainment and establishment of the amount (if any) due from the transferor, the amounts due to the transferor and the transferees must be retained and carried to separate accounts.

In re Akerman, [1891] 3 Ch. 212, 219; *In re Goy & Co., Ld.*, [1900] 2 Ch. 149, 153; and *In re Brown & Gregory, Ld.*, [1904] 1 Ch. 627; [1904] 2 Ch. 448, applied. *In re* RHODESIA GOLDFIELDS, LIMITED. PARTRIDGE *v.* RHODESIA GOLDFIELDS, LIMITED – **Swinfen Eady J. 239**

2.—— *Debenture-holders' Action — Receiver and Manager — Preservation of Assets—Order giving Receiver and Manager leave to borrow and create First Charge on Assets—Loan by Bank—First Charge by Deed—Realization—Insufficient Assets—Receiver's Remuneration—Costs of Preservation and Realization—Priorities.*

In an action by a debenture-holder on behalf of himself and all the other debenture-holders of a company to realize his security the usual judgment in a debenture-holders' action was pronounced and a receiver and manager was appointed. On the same day an order was made on the application of the plaintiff in the action authorizing the receiver to borrow 500*l.* to be secured by a first charge on the assets of the company in priority to the debenture-holders. The receiver borrowed the money from a bank, and the deed containing the charge did not in express terms exempt the receiver from personal liability to repay the loan. The receiver realized the whole of the assets comprised in the debentures, and there was in Court a fund which was insufficient to satisfy all the claims upon it. The bank claimed that, subject to the costs of realization in the strict sense, they were entitled to be first paid out of the fund their charge, on the ground that the receiver, having borrowed the money from them, was their debtor, and that

COMPANY—*continued.*

they were entitled to be subrogated to him in respect of his indemnity against the fund :—

Held, that the proper inference to be drawn from the transaction was that the receiver did not intend to pledge his credit and that the bank did not rely upon it, and therefore that there was no right of indemnity to which the principle of subrogation could apply.

Dictum of Cozens-Hardy L.J. in *In re Glasdir Copper Mines, Ld.*, [1906] 1 Ch. 365, 384, followed.

Held, therefore, that the fund must be applied, first, in payment of the plaintiff's costs of the action as between solicitor and client ; secondly, in payment of the receiver's remuneration ; and, thirdly, in payment of the loan to the bank, so far as the balance of the fund would extend.

In re A. BOYNTON, LIMITED. HOFFMANN *v.* A. BOYNTON, LIMITED – **Warrington J. 519**

3. —— *Director — Contract of Service — Restraint on Trade—Winding-up—Repudiation —Specific Performance—Information acquired during Service—Confidential Relation—Injunction.*

The defendant agreed with the plaintiff company, of which he was a director, to hold office for seven years at a fixed salary, and covenanted that so long as he should continue to hold office and for seven years after ceasing to hold such office he would not either solely or jointly with, or as manager or agent for, any other person or persons or company directly or indirectly carry on or be engaged or interested in any business that would compete with that carried on by the company. A receiver and manager was afterwards appointed in a debenture-holders' action and a compulsory winding-up order was made against the company. The receiver and manager having given notice to the defendant that his services would no longer be required and ceased to pay his salary, the defendant commenced to carry on business on his own account. During the course of his employment by the company the defendant had caused to be made for his own purposes certain lists of the names and addresses of the company's customers, and after the winding-up he sent circulars to and solicited orders from such customers.

In an action to restrain him from carrying on business in competition with the company in breach of his covenant, and for an order upon him to deliver up the lists of customers :—

Held, that the winding-up order operated as a wrongful dismissal of the defendant, and that, applying the principle of *General Billposting Co.* v. *Atkinson*, [1909] A. C. 118, he was no longer bound by his restrictive covenant.

But *held*, also, that he had no right to make or take copies of the lists in question for his own purposes, and that he must deliver up all such lists or copies thereof as were in his possession or under his control. MEASURES BROTHERS, LIMITED *v.* MEASURES – – **Joyce J. 336**

4. —— *Meeting—General Meeting—Special Business — Minutes — Notice — Sufficiency — Resolutions—"Alterations or amendments"—Appointment of additional Directors.*

The notice of the annual general meeting of a company stated that such meeting was for the purpose of considering and, if thought fit, passing certain resolutions, "with such amendments and alterations as shall be determined upon at such meeting." One of such resolutions was that three named gentlemen should be appointed directors. According to the minutes of the general meeting the notice was taken as read, and the three named gentlemen were proposed as directors. An amendment was, however, carried that in addition to these three gentlemen two additional named directors should be appointed. Under the articles of association of the company it was provided (54.) that the notice of an ordinary general meeting at which special business was to be transacted should specify the general nature of such special meeting ; (69.) that the number of directors should be no more than seven or less than three ; (62.) that the signed minutes of the proceedings at a general meeting should be conclusive evidence that the proceedings were regular.

Upon motion by the company for an injunction to restrain the two additional directors from acting :—

Held, that the Court was entitled to look at the notice convening the meeting as part of the res gestæ, to see if the proceedings were regular.

Held, further, that, having regard to the terms of the articles of association, the business transacted at the meeting was within the scope of the special business indicated in the notice. BETTS & CO., LIMITED *v.* MACNAGHTEN **Eve J. 430**

5. —— *Prospectus — Facts to be stated in Prospectus—Previous Offer of Shares—Remedy for Omission—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 81.

The mere fact that a prospectus issued by a company does not contain some of the facts or contracts required to be stated by s. 81 of the Companies (Consolidation) Act, 1908, does not entitle a person who has taken shares on the faith of the prospectus to rectification of the register. The difference in the wording of that section and s. 38 of the Companies Act, 1867, has not, in this respect, altered the law. *In re* WIMBLEDON OLYMPIA, LIMITED **Neville J. 630**

6. —— *Reduction of Capital—Memorandum —Articles—Reorganization of Capital—Consolidating different Classes of Stocks and Shares into one Stock—Validity of Resolutions—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 7, 45, 48, 69 ; *Table A, art.* 4—"*and Reduced*" *dispensed with.*

By the memorandum of a limited company formed in 1894 under the Companies Acts the capital of the company was 1,000,000*l.* divided into 100,000 ordinary shares of 10*l.* each, and the capital was afterwards increased by special resolution in the statutory mode. The company's articles of association authorized the company to issue its share capital with such preferences or special rights as they thought fit, and provided (article 12) that all shares should be held on the terms that any rights or preference or special privilege of the holders of any

COMPANY—*continued.*

class of shares should not be interfered with except by a special resolution passed and confirmed by shareholders of that class, and every resolution so passed should be a valid resolution binding all shareholders of such class ; and (article 14) that the company might by special resolution reduce its capital.

In 1903 the company divided its existing share capital into preference shares and stocks and ordinary stocks by special resolution, which resolution became part of the memorandum. In 1909 the company, having lost capital to a large amount, passed in general meeting, held under s. 69 of the Companies (Consolidation) Act, 1908, a special resolution reducing its capital by writing off the loss in certain proportions from the nominal amount of its then issued preference shares and stock and ordinary stock, and at the same time passed a second special resolution that upon the reduction of capital being sanctioned by the Court the preference rights attaching to the preference shares and stock should be extinguished, and that the preference stock and ordinary stock resulting from the reduction of capital should forthwith thereafter be consolidated into one consolidated ordinary stock ranking pari passu for all purposes. Those two resolutions were at the same time also passed at separate meetings of each class of preference share and stock holders and ordinary stock holders held under article 12. The company then presented a petition for the sanction of the Court to the resolution reducing its capital. Dissentient stockholders opposed on the ground that the second resolution came within s. 45 of the Act and was ultra vires as it had not been passed in conformity with that section.

The Court sanctioned the reduction, holding that the resolutions had been validly passed under the articles and that s. 45 did not apply.

The words " and reduced " were dispensed with as they would be injurious to the company in Australia. *In re* AUSTRALIAN ESTATES AND MORTGAGE COMPANY, LIMITED

Neville J. 414

7. —— *Shares — Executors — Production of Probate—Transfer to One Executor—Nominal Consideration—Breach of Trust—Notice—Revocation of Signature by One Transferor — Rectification of Register — Registered Joint Holders—Director—Qualification.*

The plaintiff and others were executors of a shareholder in the defendant company. The company on production of probate registered them as joint holders of the shares. The plaintiff was afterwards appointed a director of the company subject to his acquiring the necessary qualification. The articles of association required each director to be the registered holder of not less than twenty shares. The plaintiff already held five shares in his own name. The executors executed a transfer of fifteen of the testator's 112 shares to the plaintiff for a nominal consideration. On the next day one of the transferors wrote to the company revoking his signature of the transfer and notifying the company not to register the transfer. The directors of the company thereupon refused to register

COMPANY—*continued.*

the transfer, and subsequently informed the plaintiff that he had ceased to be a director, not having acquired the necessary qualification within the statutory period, and thenceforth excluded him from the directors' meetings. In an action by the plaintiff for an injunction to restrain the directors from excluding him, and for rectification :—

Held, that the notice acquired by the company by production of probate was limited to a notice of the names and addresses of the persons who had constituted themselves the executors of the testator, and the company were not justified in gratuitously assuming that the transfer necessarily involved a breach of trust and, in the absence of any specific reason for the withdrawal of the signature, in refusing indefinitely to register the transfer ; and that the register must be rectified by the registration of the transfer.

Held, further, that the plaintiff was qualified to be a director of the company by virtue of his registration as a joint holder of the testator's shares.

In re Glory Paper Mills Co., [1894] 3 Ch. 473, applied. GRUNDY *v.* BRIGGS – **Eve J. 444**

8.—— *Ultra vires—Association not for Profit —Gratuitous Payment—Pension to retired Officer —Memorandum of Association—Board of Trade Form — Construction — Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 23—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 20.

The Cyclists' Touring Club was registered as an association not for profit by licence of the Board of Trade under s. 23 of the Companies Act, 1867, now replaced by s. 20 of the Companies (Consolidation) Act, 1908.

Clause 4 of the memorandum of association, a clause required by the Board of Trade as a condition of granting a licence, provided as follows :—

"The income and property of the club, whencesoever derived, shall be applied solely towards the promotion of the objects of the club as set forth in this memorandum of association, and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit to the members of the club.

"Provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officers or servants of the club, or to any member of the club or other person in return for any services actually rendered to the club" :—

Held, on the construction of this memorandum, that the grant of a pension by way of gratuity to a retired secretary, who was about to resign his membership, was intra vires.

Principles stated in the trading company cases, *Small* v. *Smith*, (1884) 10 App. Cas. 119, 129 ; *Taunton* v. *Royal Insurance Co.*, (1864) 2 H. & M. 135, 141 ; and *Hutton* v. *West Cork Ry. Co.*, (1883) 23 Ch. D. 654, 671, discussed and applied. CYCLISTS' TOURING CLUB *v.* HOPKINSON – – – **Swinfen Eady J. 179**

9.—— *Winding-up —Contributory—Transfer of Shares to escape Liability—Validity—Transfer*

COMPANY—*continued.*

out and out—Power of Directors to refuse Registration.

Where the articles contain no clause authorizing directors to reject a transferee, a shareholder may up to the last moment before liquidation, and for the express purpose of escaping liability, transfer his partly-paid shares to a transferee, even though he be a pauper, and may compel the directors to register that transfer, provided it be an out and out transfer reserving to the transferor no beneficial right to the shares direct or indirect. Whether the transfer is of that character is a question of fact.

Hyam's Case, (1859) 1 D. F. & J. 75 ; *Costello's Case*, (1860) 2 D. F. & J. 302 ; and *Budd's Case*, (1861) 3 D. F. & J. 297, discussed and explained.

Lund's Case, (1859) 27 Beav. 465, overruled.

Where the articles contain a clause empowering the directors to reject a transferee whom they do not approve, the transferor cannot escape liability if he has actively or passively induced the directors to pass and register a transfer (even though it be an out and out transfer) which, but for his conduct, they would have refused to register. Here again the question is one of fact.

Whether the articles do or do not contain a clause authorizing the directors to refuse registration, the transferor cannot escape liability where he has obtained the advantage of executing and registering his transfer upon an opportunity obtained by him fraudulently or in breach of some duty which he owed the corporation.

Decision of Neville J., [1910] 1 Ch. p. 207, affirmed.

In re Discoverers Finance Corporation, [1908] 1 Ch. 141, overruled. *In re* DISCOVERERS FINANCE CORPORATION, LIMITED. LINDLAR'S CASE – – – – – – **C. A. 312**

10. —— *Winding-up — Debenture—"Floating Charge" within Three Months of Winding-up —Cash paid "at the time of the creation of the charge"—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 93, 212.

The Companies (Consolidation) Act, 1908, s. 212, provides that a floating charge on the property of a company created within three months of the commencement of the winding up of the company shall, unless the company is solvent immediately after the creation of the charge, be invalid except to the amount of any cash paid to the company "at the time of or subsequently to the creation of, and in consideration for, the charge."

The question whether any particular payment comes within the terms of the section as being in substance a present advance must always be a question of fact depending upon the circumstances of the case.

As a general rule a payment made on account of the consideration for the charge and in anticipation of its execution and in reliance on a promise to execute it, although made some days before its execution, is made "at the time of" its creation within the meaning of the section.

A company being in need of funds, the directors on November 25, 1909, accepted an offer by S. to advance 1000*l.* upon the security

COMPANY—*continued.*

of all the property of the company and passed a resolution that a debenture to be prepared by S. should be executed at the next meeting of the board. S., relying on the resolution, then paid 350*l.*, and on December 2 a further 350*l.*, to the company on account of the 1000*l.* At the next board, on December 6, the debenture was duly executed in the usual way, and S. then paid 300*l.* as the balance of the 1000*l.*, and registered the debenture on December 23. The company went into liquidation in the following January, and the liquidator disputed the validity of the debenture :—

Held, that under the circumstances the whole of the 1000*l.* was advanced "at the time of" the creation of the debenture and that it was a valid security for that sum. *In re* COLUMBIAN FIREPROOFING COMPANY, LIMITED **Neville J. 758**

11. —— *Winding-up Petition—Bond Investment Holder—"Contingent or prospective creditor" — Locus standi of Petitioner — Assurance Company—Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *ss.* 2, 21—*Companies Act*, 1907 (7 *Edw.* 7, *c.* 50), *s.* 28—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 130 (iv.) ; *s.* 137, *sub-s.* 1 (*c*)—*Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 15, 34, 38.

The owner of an investment bond issued by an assurance company, who, upon making periodical payments to the company, will at a future date become entitled to the payment of a certain sum of money, is a "contingent or prospective creditor" of the company within the meaning of those words in s. 137 of the Companies (Consolidation) Act, 1908, and can under that section petition for the winding up of the company.

Semble, such a bondholder will by virtue of ss. 1 and 34 of the Assurance Companies Act, 1909 (which comes into operation on July 1, 1910), be deemed to be a policy-holder for the purposes of s. 15 of that Act, which is not an enabling but a restrictive section and limits the rights of policy-holders to present a winding-up petition as therein mentioned. *In re* BRITISH EQUITABLE BOND AND MORTGAGE CORPORATION, LIMITED – – – **Neville J. 574**

—— Chartered company — Debentures, Contract to issue — Floating charge on foreign land—Ultra vires – – **354**
See CONFLICT OF LAWS.

—— Friendly society — Conversion into company—Enlargement of objects—Special resolution – – – – – **228**
See FRIENDLY SOCIETY.

—— Lease — Assignment to limited company after consent refused — "Respectable and responsible person"—Forfeiture of lease – – – – – **754**
See LANDLORD AND TENANT. 6.

—— Livery Company of city of London, Gift to — Devise for general purposes of company – – – – – **426**
See CHARITY. 2.

COMPENSATION — Compulsory purchase — Widening street — Notice to treat — Withdrawal – – – – – **35**
See STREETS.

—— Lands taken for public undertaking — Compensation for extinguishment of commonable rights — Payment to de facto committee – – – **552**
See COMMON LANDS.

—— Trade mark—Registered mark—Innocent infringer—Injunction—Whether plaintiff also entitled to compensation **257**
See TRADE MARK. 1.

COMPULSORY PURCHASE—Widening street—Notice to treat — Withdrawal — Compensation – – – – – **35**
See STREETS.

CONDITIONS — Land transfer—Registration—Conditions annexed to title – **325**
See VENDOR AND PURCHASER. 4.

—— Lessor and lessee—Unreasonable condition —Declaratory order—Costs – **452**
See LESSOR AND LESSEE.

—— Name and arms, Condition subsequent requiring assumption of—Infant – **541**
See SETTLEMENT. 3.

—— Precedent—Mortgage — Foreclosure absolute—Consent order—Effect—Demand in writing – – – – **588**
See MORTGAGE. 3.

—— Will—Absolute gift—Gift on condition—Precatory trust for charity—"I specially desire" – – – – – **219**
See WILL. 2.

CONFIDENTIAL RELATIONS—Director—Contract of service—Restraint on trade—Winding-up – – – – **336**
See COMPANY. 3.

CONFLICT OF LAWS—*Contract—Proper Law — Intention — Contract to issue Debentures — Floating Charge on Foreign Land — Clog on Equity of Redemption—Chartered Company—Breach of Charter—Ultra vires.*

The proper law of a contract that is neither immoral nor contrary to public policy must be determined by the intention of the parties.

Lloyd v. *Guibert*, (1865) L. R. 1 Q. B. 115, 120, 122; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, (1883) 10 Q. B. D. 521, 540; *Jacobs* v. *Crédit Lyonnais*, (1884) 12 Q. B. D. 589, 600; *In re Fitzgerald*, [1904] 1 Ch. 573, 587; *Peninsular and Oriental Steam Navigation Co.* v. *Shand*, (1865) 3 Moo. P. C. (N. S.) 272, 292; *In re Missouri Steamship Co.*, (1889) 42 Ch. D. 321; *Chamberlain* v. *Napier*, (1880) 15 Ch. D. 614, 631; and *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202, 207, applied.

The English equitable rule against clogging the equity of redemption of a mortgage applies to an English contract for an issue of mortgage debentures to secure a loan and will be enforced

CONFLICT OF LAWS—*continued.*

by the English Courts against a contracting party in the jurisdiction although the floating security to be created by the debentures comprises foreign land, where the clog doctrine is possibly not recognized.

Noakes & Co. v. *Rice*, [1902] A. C. 24, 34; *Bradley* v. *Carritt*, [1903] A. C. 253, 261; and *Samuel* v. *Jarrah Timber and Wood Paving Corporation* [1904] A. C. 323 (clog cases); and *Penn* v. *Lord Baltimore*, (1750) 1 Ves. Sen. 444; 1 W. & T. L. C., 7th ed. p. 755; *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.*, [1892] 2 Ch. 303; *Ex parte Pollard*, (1840) Mont. & Ch. 239; 4 Deac. 27; *Coote* v. *Jecks*, (1872) L. R. 13 Eq. 597; *Hicks* v. *Powell*, (1869) L. R. 4 Ch. 741; and *Ex parte Holthausen*, (1874) L. R. 9 Ch. 722 (jurisdiction in personam cases), applied.

Semble, the doctrine of ultra vires does not apply to a chartered company. Such a company has all the powers of a private person, and acts done in breach of its charter, though a ground for revocation by scire facias, are nevertheless valid.

Sutton's Hospital Case, (1612) 10 Rep. 1a, 30b; *Riche* v. *Ashbury Railway Carriage and Iron Co.*, (1874) L. R. 9 Ex. 224, 263, 292; and *Baroness Wenlock* v. *River Dee Co.*, (1883) 36 Ch. D. 675, n., 685, n., applied. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED – **Swinfen Eady J. 354**

CONSIDERATION—Corporate lands—Power to sell—Perpetual rent-charge—Approval of Local Government Board – **68**
See CORPORATION.

CONTRACT—*Parties—Covenant by Covenantor with himself and others—Joint Right to enforce Obligation—Validity.*

By a marriage settlement W. W. K. assigned to the trustees a policy of assurance to be held upon the trusts of the settlement; and he, T. D. B., and C. J. K. (two of the trustees of the settlement) covenanted with the trustees to keep the policy on foot and pay the premiums. A new trustee was afterwards appointed in the place of one who retired; and the policy and the right to enforce the covenant were vested in T. D. B., C. J. K., and E. H. E. (the new trustee) as joint tenants. W. W. K. made default in payment of the premiums, and T. D. B. and C. J. K. refused to continue making the payments personally. E. H. E. brought an action against W. W. K., T. D. B., and C. J. K., the covenantors, for a declaration that they were jointly and severally liable to pay the premiums, and for an order on them to do so. T. D. B. and C. J. K. raised a point of law, asking for a declaration that the covenant was void so far as regarded them by reason of their being named therein both as covenantors and covenantees, and that the action might be dismissed:—

Held, that the covenant was void and the action must be dismissed.

De Tastet v. *Shaw*, (1818) 1 B. & Al. 664, and *Boyce* v. *Edbrooke*, [1903] 1 Ch. 836, followed.

Rose v. *Poulton*, (1831) 2 B. & Ad. 822, explained. ELLIS *v.* KERR **Warrington J. 529**

CONTRACT—*continued.*

—— Conflict of laws—Proper law—Intention—Contract to issue debentures – **354**
See CONFLICT OF LAWS.

—— Grant of right to make "a tunnel"—Personal contract—Uncertainty—Perpetuity—Assignability – – **12**
See RAILWAY.

CONTRACT OF SERVICE—Director—Restraint on trade — Company — Winding-up—Repudiation—Specific performance **336**
See COMPANY. 3.

CONTRIBUTORY — Company — Winding-up—Transfer of shares to escape liability—Validity – – – – – **312**
See COMPANY. 9.

CONVERSION — Friendly society — Conversion into company—Enlargement of objects—Special resolution – – – **228**
See FRIENDLY SOCIETY.

—— Will—Tenant for life and remainderman—Profits of business—Capital or income
See WILL. 9. **814**

—— Will—Trusts of real estate—Power of sale—Conversion after death of heir-at-law—Real or personal estate – – **750**
See WILL. 10.

CONVEYANCE—Plan – – – – **741**
See VENDOR AND PURCHASER. 1.

CONVEYANCING AND LAW OF PROPERTY ACTS—Lease—Relief against forfeiture—Breach of covenant not to sub-let without consent—Effect of negligence
See LANDLORD AND TENANT. 2. **777**

CORPORATION—*Municipal Corporation—Corporate Lands—Power to Sell—Consideration—Perpetual Rent-charge—Approval of Local Government Board—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 108, 109.

A municipal corporation has power under the Municipal Corporations Act, 1882, to dispose of its corporate lands, with the approval of the Local Government Board, in consideration of a perpetual yearly chief rent charged upon the lands. MAYOR OF SCARBOROUGH *v.* COOPER
Joyce J. 68

—— Membership—Local Act—Construction—"Any person"—Royal Naval School Act, 1840 – – – – – **806**
See INFANT.

COSTS—*Appeal—Order for Security—Poverty—Order for Leave to prosecute Appeal in forma pauperis—Effect of Pauper Order on Order for Security.*

An order in the usual form requiring an appellant to give security for the costs of the appeal on the ground of poverty, and containing a stay of proceedings until security is given, ceases to operate if, within the time limited for giving security, the appellant obtains an order for leave to prosecute the appeal in forma pauperis. WILLÉ *v.* ST. JOHN – – **C. A. 701**

COSTS—*continued.*

—— Company — Loan by bank — Insufficient assets—Receiver's remuneration—Costs of preservation and realization—Priorities – – – – – **519**
See COMPANY. 2.

—— Lessor and lessee— Declaratory order **452**
See LESSOR AND LESSEE.

—— Solicitors' costs.
See under SOLICITOR.

—— Taxation — Motion — Speedy trial — Counsel's fees – – – – **410**
See PRACTICE. 2.

—— Vendor and purchaser summons—Forcing doubtful title—Difficult question of construction – – – – **43**
See VENDOR AND PURCHASER. 4.

COUNSEL'S FEES — Costs — Taxation—Motion—Speedy trial – – – – **410**
See PRACTICE. 2.

COUNTERPART — Ambiguity in lease — Explanation by reference to counterpart—Forfeiture—Waiver – – – **777**
See LANDLORD AND TENANT. 2.

COVENANT—Assign, Licence to—Unreasonable condition — Declaratory order — Costs
See LESSOR AND LESSEE. **452**

—— Brewer's lease — Tied house — Lessee's covenant to buy malt liquors from lessor — Rise in prices — Breach of covenant – – – **262, 270, n.**
See LANDLORD AND TENANT. 3, 4.

—— Lease—Assignment to limited company after consent refused—Forfeiture of lease—"Respectable and responsible person" – – – – – **754**
See LANDLORD AND TENANT. 6.

—— Lease—Forfeiture, Relief against—Breach of covenant not to sub-let without consent—Effect of negligence – **777**
See LANDLORD AND TENANT. 2.

—— Lease of coal mines—Construction—Mines and minerals – – – – **766**
See MINES.

—— Mortgage—"Clog" on redemption—Public-house—"Tie" — Restrictive covenant
See MORTGAGE. 2. **620**

—— Parties — Covenant by covenantor with himself and others — Joint right to enforce obligation—Validity – **529**
See CONTRACT.

—— Pasture lands, Covenant not to plough up—Good husbandry – – – **437**
See LANDLORD AND TENANT. 1.

—— Restrictive covenants—Building scheme—Right of purchasers inter se—Land transfer — Registration — Conditions annexed to title – – – **325**
See VENDOR AND PURCHASER. 3.

COVENANT—*continued.*

—— Settlement — Agreement to settle wife's after-acquired property — Volunteers *See* SETTLEMENT. 1. 609

DEBENTURE-HOLDERS AND DEBENTURES—Company.
See under COMPANY.

DEBTS RECOVERY ACT, 1830. – – 588
See MORTGAGE. 3.

DECLARATORY ORDER—Lessor and lessee 452
See LESSOR AND LESSEE.

DEPOSIT—Forfeiture of—Specific performance —Default in payment by purchaser — Form of order – – – – 176
See VENDOR AND PURCHASER. 2.

—— Repayment — Life assurance company — Transfer of business to another company – – – – – 458
See INSURANCE (LIFE).

DIRECTORS—Company.
See under COMPANY.

DISCHARGE — Surety — Novation — Release of principal debtor – – – 464
See PRINCIPAL AND SURETY.

DISENTAILING DEED—Tenant for life—Power to appoint portions — Mortgage of settled estates — Priority — Implied release of power – – – 297
See SETTLEMENT. 7.

DIVIDENDS — Tenant for life to dividends, Right of—Investment in stock—Dividends declared but not paid – 389
See SETTLED LAND. 2.

DUTY—Inland Revenue.
See under REVENUE.

ECCLESIASTICAL LAW — *Rectory — Statute — Construction — Mischief — Purview — Ecclesiastical Law—Residence of Parsons on Benefices—Lease of Rectory—Omission of statutory "condition for avoiding the same" on Bishop ordering Personal Residence—Void or voidable—Pluralities Act*, 1838 (1 & 2 *Vict. c.* 106), *s.* 59.

With the object of enforcing the residence of parsons on their benefices, if required by the bishop, s. 59 of the Pluralities Act, 1838, provides that "Any agreement made for the letting of the house of residence . . . . belonging to any benefice, to which house of residence any spiritual person may be required, by order of the bishop as aforesaid, to proceed and to reside therein . . . . shall be made in writing, and shall contain a condition for avoiding the same, upon a copy of such order . . . . being served upon the occupier thereof, or left at the house, and otherwise shall be null and void."

The section then provides for the service of the order and imposes a penalty of 40*s.* a day on any person holding over after service. After enabling "the spiritual person so directed to reside" to

ECCLESIASTICAL LAW—*continued.*

obtain possession by summary proceedings before a justice of the peace, the section proceeds: "Provided that any person who shall have been in possession of any such house of residence . . . . under a verbal agreement only, or under any agreement in which the condition aforesaid for avoiding the same shall not be inserted, and who shall be turned out of possession by virtue of this Act, shall be entitled to sue the person with whom he . . . . had entered into such agreement for damages occasioned by his . . . . being so turned out of possession, to be recovered in any of Her Majesty's superior Courts at Westminster":—

Held, that a lease of a rectory for the term of the rector's incumbency, though not containing the statutory condition of avoidance, was not absolutely void, but was good as between the rector and the lessee, and would only become void on the bishop ordering personal residence.

Held, also, that the object of s. 59 in requiring the insertion of the condition of avoidance was to bring the provisions of the law to the attention of the lessee, and the only effect of omitting it was to render the lessor liable in damages under the proviso if the lessee was turned out by reason of the bishop's order. RICKARD *v.* GRAHAM – **Swinfen Eady J.** 722

—— Advowson — Union of benefices — Single patron—Act of union—No provision for alternate presentation — Order of exchange. 706
See ADVOWSON.

EDUCATION—School.
See under SCHOOL.

ELECTION—Appointment—Remoteness — Rule against double possibilities. 1
See SETTLEMENT. 5.

ENDOWMENT—Will — Construction — Charity —Legacy "to found a bed in a hospital"
See CHARITY. 1. 73

EQUITABLE MORTGAGE.
See under MORTGAGE.

ESTATE DUTY.
See under REVENUE.

EXECUTION—Judgment creditor—Arrears of rent—"Landlord"—"Rent" – 480
See LANDLORD AND TENANT. 5.

EXECUTORS — Company — Shares — Production of probate—Transfer to one executor—Nominal consideration — Breach of trust – – – – – 444
See COMPANY. 7.

—— Imperfect gift of personalty — Indefinite gift—Promise to pay in the future—Executor – – – – – 188
See ADMINISTRATION. 2.

EXECUTORY BEQUEST—Or limitation over on death of parent—Rule in *Wild's Case*
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EXPULSION — Notice — Validity — Partner, Breach of duty as – – – 495
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"FLOATING CHARGE"—Company—Winding-up — Debenture — "Floating charge" within three months of winding-up
See COMPANY. 10. 758

FORECLOSURE—Mortgages.
See under MORTGAGE.

FOREIGN LAND—Floating charge on—Contract to issue debentures—Chartered company – – – – – 354
See CONFLICT OF LAWS.

FORFEITURE—Deposit—Specific performance —Default in payment by purchaser—Form of order – – – – 176
See VENDOR AND PURCHASER. 2.

—— Lease—Assignment to limited company after consent refused — "Respectable and responsible person" – – 754
See LANDLORD AND TENANT. 6.

—— Lease—Sub-letting—Relief against forfeiture—Breach of covenant not to sublet without consent—Effect of negligence – – – – – 777
See LANDLORD AND TENANT. 2.

FRIENDLY SOCIETY—*Conversion into Company —Enlargement of Objects—Special Resolution —Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *s.* 8, *sub-s.* 1; *s.* 70, *sub-ss.* 1, 2, 3; *s.* 71, *sub-s.* 1; *s.* 74.

It is not competent for a society, registered under the Friendly Societies Act, 1896, under the guise of converting itself into a limited company pursuant to s. 71, sub-s. 1, of that Act, to turn itself into a company with objects much more extensive than and widely differing from the objects specified by the rules of the society or by s. 8, sub-s. 1, of the Act. The procedure under s. 71, sub-s. 1, is a mere matter of machinery under which a society can become a different legal entity having objects identical with the objects prescribed by its rules or by s. 8, sub-s. 1, though when converted it can exercise such powers of altering or enlarging its objects, as defined by its memorandum, as are conferred by the Companies Act on all limited companies.

Decision of Joyce J. affirmed. BLYTHE *v.* BIRTLEY – – – – – C. A. 228

FRIVOLOUS AND VEXATIOUS—Dismissal of action as—Time for appealing – 489
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GRANT—Derogation from—Implied release of power – – – – – 297
See SETTLEMENT. 7.

—— Railway—Severed lands—Grant of right to make "a tunnel" — Uncertainty — Perpetuity—Assignability – – 12
See RAILWAY.

HEIRLOOMS—*Direction in Will for Chattels to pass with Real Estate—Death of Infant Tenant in Tail without having Possession.*

E. was legal tenant for life in possession of a mansion-house under a will, which limited the mansion-house in remainder to his first and other sons in tail, and bequeathed certain pictures as heirlooms, to pass with the house in the same manner as if they were land or other real property appendant or appurtenant thereto, and to continue annexed to the house as long as the law would permit, and be inherited or enjoyed by the several persons who should succeed to the house under or by virtue of the limitations contained in the will. The eldest son of E. died in his lifetime, an infant and unmarried, but E. had two other sons, one of whom had attained twenty-one:—

Held, that E., as next of kin of the deceased son, was entitled absolutely to the chattels settled as heirlooms.

In re Lord Chesham's Settlement, [1909] 2 Ch. 329, distinguished. *In re* PARKER. PARKER *v.* PARKIN – – Parker J. 581

HOSPITAL — Will — Construction — Charity — Legacy "to found a bed in a hospital" —Endowment – – – – 73
See CHARITY. 1.

HOTCHPOT—Surrender of appointor's life interest — Immediate possession — Death of appointor – – – – 78
See SETTLEMENT. 2.

HUSBAND AND WIFE — Married woman — Settlement—General power to appoint by will — Event in which power to arise —Non-occurrence—Exercise of power during coverture – – – 157
See POWER OF APPOINTMENT.

—— Settlement.
See under SETTLEMENT.

HUSBANDRY—Covenant not to plough up pasture lands — Waste — Good husbandry – – – – – 437
See LANDLORD AND TENANT. 1.

INCLOSURE—Lands taken for public undertaking—Action to determine persons interested in compensation – – 552
See COMMON LANDS.

INCOME — Capital or — Profits of business — Tenant for life and remainderman 814
See WILL. 9.

INDUSTRIAL AND PROVIDENT SOCIETY—*Disputes between Society and Members—Rules—Arbitration—Ultra vires Acts—Stay of Proceedings—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 22—*Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *s.* 49.

The rules of an industrial and provident society, which substantially followed the terms of s. 49 of the Industrial and Provident Societies Act, 1893, provided for the reference of all disputes between the society and its members to arbitration.

INDUSTRIAL AND PROVIDENT SOCIETY—*continued.*

A member of the society commenced an action against the committee of management of the society for a declaration that certain resolutions passed by them were ultra vires the society, and for consequential relief:—

Held, that the plaintiff's claim was a dispute within the arbitration rule and s. 49, and that the proceedings in the action must be stayed.

Where the rules of a registered society contain a provision for the reference of disputes between a member and the society and its officers to arbitration it is not an answer to an application for a stay of proceedings that the question at issue is whether or not the act complained of is ultra vires.

Stone v. *Liverpool Marine Society*, (1894) 63 L. J. (Q. B.) 471, applied. COX *v.* HUTCHINSON – – – – **Warrington J. 513**

INFANT—*Corporation—Membership—Local Act—Construction—"Any person"—Royal Naval School Act*, 1840 (3 *Vict. c. lxxxvi.*), *s.* 3.

By an Act of 1840 (3 Vict. c. lxxxvi.) passed for the establishment and government of an institution called the Royal Naval School, it was provided by s. 3 that "any person" who should pay to the treasurer of the institution the amount therein fixed should be a member of the corporation. One of the defendants, on whose behalf the required subscription had been paid, was an infant and a pupil at the school, and voted at a meeting of the institution at which an important proposal affecting the future of the school was debated. Upon a summons raising the question whether the expression "any person" included an infant so that he could become a member of the corporation and vote at meetings:—

Held, that there being nothing in the statute in question to shew that the word "person" included an infant, and having regard to the fact that the corporation was formed for the establishment and management of a school, and that every member of the corporation was eligible for appointment to the council of the institution, the Legislature could not have intended that the membership of the corporation should include minors; and the infant, therefore, was not eligible as a member. *In re* ROYAL NAVAL SCHOOL. SEYMOUR *v.* ROYAL NAVAL SCHOOL **Eve J. 806**

—— Heirlooms—Death of infant tenant in tail without having possession – – **581**
See HEIRLOOMS.

—— Settlement of real estate—Condition subsequent requiring assumption of name and arms – – – – – **541**
See SETTLEMENT. 3.

—— Vesting order—Stock in name of infant and another to which infant is entitled—Form of order – – – **223**
See PRACTICE. 3.

IN FORMA PAUPERIS—Appeal—Security for costs– – – – – – **701**
See COSTS.

INFRINGEMENT—Trade mark.
See under TRADE MARK.

INJUNCTION—Company.
See under COMPANY.

—— Landlord and tenant.
See under LANDLORD AND TENANT.

—— Stream, Natural — Pollution — Sewage works—Injunction—Discharge of injunction on subsequent facts – **48**
See STREAM.

—— Trade mark.
See under TRADE MARK.

—— Trade name.
See under TRADE NAME.

INSURANCE (LIFE)—*Life Assurance Company—Liquidation—Transfer of Business to another Company — Deposit — Repayment — Rights of Policy-holders—Life Assurance Companies Act*, 1870 (33 *&* 34 *Vict. c.* 61), *ss.* 3, 14—*Life Assurance Companies Act*, 1872 (35 *&* 36 *Vict. c.* 41), *s.* 7.

A life assurance association which has not accumulated out of premiums a life assurance fund of 40,000*l.* according to s. 3 of the Life Assurance Companies Act, 1870, and which has gone into voluntary liquidation and transferred its business to a purchasing company, is not entitled to a return of any part of the statutory deposit of 20,000*l.*, unless all its policy-holders have released and abandoned their claims against the association and the deposit, and accepted the liability of the purchasing company, such abandonment and acceptance being signified in writing, pursuant to s. 7 of the Life Assurance Companies Act, 1872.

Ex parte Scottish Economic Life Assurance Society, (1890) 45 Ch. D. 220, followed. *In re* LIFE AND HEALTH ASSURANCE ASSOCIATION, LIMITED – – – – **Eve J. 458**

——, Company — Winding-up petition — Bond investment holder — "Contingent or prospective creditor" – – **574**
See COMPANY. 11.

INTERLOCUTORY OR FINAL ORDER—Appealing, Time for—Dismissal of action as frivolous and vexatious – – **489**
See PRACTICE. 1.

INTESTACY—Will—Partial failure of trusts—Conversion after death of heir-at-law—Real or personal estate – – **750**
See WILL. 10.

IRISH LAND ACTS — Jointure rent-charge — Arrears—"Incumbrance affecting the inheritance"—Discharge out of capital moneys – – – – – **106**
See SETTLED LAND. 1.

JOINTURE RENT-CHARGE — Arrears — "Incumbrance affecting the inheritance"—Discharge out of capital moneys—Irish Land Acts – – – **106**
See SETTLED LAND.

JUDGMENT CREDITOR — Execution — Arrears of rent—"Landlord"—"Rent" - **480**
See LANDLORD AND TENANT. 5.

JURISDICTION—Charity.
See under CHARITY.

LAND TRANSFER—Estate duty — Testamentary expenses — Insufficient general personal estate to pay duty — Marshalling - - - - - **564**
See REVENUE. 2.

—— Restrictive covenants—Building scheme—Right of purchasers inter se—Registration—Conditions annexed to title **325**
See VENDOR AND PURCHASER. 3.

LANDLORD AND TENANT — *Agreement of Tenancy—Construction—Covenant not to plough up Pasture Lands—Waste—Good Husbandry—Costs.*

By an agreement made in 1895 the predecessor in title of the plaintiff let a farm to the defendant from year to year at a rent of 250*l.* subject to twelve months' notice in writing from either party, and the tenant agreed not to commit any waste or spoil, or plough or break up any of the pasture lands, and further to farm the land upon the most approved system of husbandry practised in the neighbourhood. The farm contained 215 acres, of which the most part was pasture, but there were about 53 acres of arable land. Included in the latter was one field of 22 acres which had been regularly tilled by the tenant for thirteen seasons prior to 1894, but in 1895 the tenant laid it down in grass because the crops had deteriorated in quality and quantity. In 1901 he broke up nine acres of this field, but in 1902 he relaid it in grass.

In April, 1909, the landlord gave the tenant notice to determine the tenancy. The tenant required the landlord to pay him, when he went out, for the grass laid down, and on the landlord's refusal the tenant threatened to plough up this land. In an action by the landlord for an injunction to restrain the tenant from so doing:—

Held that, upon the true construction of the agreement, the tenant had not broken any of the covenants, as the "pasture lands" in the agreement referred solely to those parts of the farm which were meadow land at the date of the agreement; and, further, that ploughing the field would not have been waste or spoil on the tenant's part.

An act which admittedly would not be a breach of covenant while the tenant is not under notice is not converted into a breach as soon as notice to quit is served.

The fact that the tenant's conduct was dictated solely by a desire to force the landlord to compensate him did not affect the construction of the contract, or disentitle the tenant to the costs of the action. RUSH *v.* LUCAS
Eve J. 437

2. —— *Ambiguity in Lease—Explanation by Reference to Counterpart—Forfeiture—Waiver—Onus as to proving Lessor's Knowledge of the Facts—Relief against Forfeiture—Breach of Covenant not to sub-let without Consent—Effect of Negligence—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 14—*Conveyancing and Law of Property Act*, 1892 (55 *&* 56 *Vict. c.* 13), *s.* 4.

A patent ambiguity in a lease may be explained by a reference to the counterpart.

A right to re-enter under a lease is not waived by the lessor, unless, knowing the facts on which the right arises, he does something unequivocal which recognizes the continuance of the lease.

The question whether there has been a waiver in such a case is one of law, and the onus is on the lessee to adduce some evidence of the lessor's knowledge, and proof of an act shewing recognition of the tenancy does not throw the onus of proving want of knowledge on the lessor.

Property held under a lease which contained a covenant against underletting without the consent of the lessor, and a clause of forfeiture in case of any breach of covenant, was mortgaged by sub-demise to the trustees of a company's debenture stock deed. The deed comprised a number of other properties. The trustees made no inquiry as to whether the lessor's consent was necessary to the sub-demise:—

Held, following *Imray* v. *Oakshette*, [1897] 2 Q. B. 218, that the trustees had been guilty of negligence, and that the Court was precluded from giving them, under s. 4 of the Conveyancing and Law of Property Act, 1892, relief against the forfeiture. MATTHEWS *v.* SMALLWOOD -
Parker J. 777

3. —— *Brewer's Lease—Tied House—Lessee's Covenant to buy Malt Liquors from Lessors—Rise in Prices—Breach of Covenant—Fair and reasonable Prices.*

The plaintiffs were brewers and the lessors of a public-house known as the Hollydale Tavern at Peckham. The defendant was a licensed victualler and the assignee of two leases of the same premises granted by the plaintiffs. The leases contained covenants by the lessees for themselves, their heirs, executors, administrators and assigns, that they would not during the term of the leases buy, receive, sell, or dispose of either directly or indirectly, or permit to be bought, received, sold, or disposed of either directly or indirectly, in or upon, out of, or about the said premises, or any part thereof, any porter, stout, beer, and ale other than such as should have been bona fide purchased of the lessors or of their successors in business.

Early in 1900, in consequence of the Boer war, an extra duty of 1*s.* a barrel (called the war tax) was imposed on beer. The principal London brewers met and agreed to put this extra 1*s.* a barrel on their customers, and in March, 1900, the plaintiffs sent a circular letter to all the tenants (including the defendant) of their tied houses in which they said: "You are doubtless aware that Her Majesty's Government have imposed a war tax on beer of 1*s.* a barrel, and we are consequently compelled to add this amount to the price of all our beer." For some time the

LANDLORD AND TENANT—*continued.*

plaintiffs supplied and the defendant paid for the beer at the increased price, but subsequently he refused to pay the extra 1*s.* a barrel, and in July, 1905, the plaintiffs sued him on a specially indorsed writ for 264*l.* 0*s.* 2*d.*, being the amount due from him for malt liquors supplied by them to him at the increased price.

By his defence the defendant admitted that the goods mentioned in the claim were sold and delivered by the plaintiffs to him in pursuance of the said covenant, and alleged that it was an implied term of the covenant that the plaintiffs would supply such porter, stout, beer, and ale as the defendant might buy or purchase from them at the fair market prices of the day, and that the prices claimed were not the fair market prices of the day for the said goods. Alternatively, he alleged that the prices claimed were unreasonable, unfair, and excessive.

Bray J. on April 28, 1906, gave judgment for the plaintiffs. The Court of Appeal on March 26, 1907, affirmed that decision. NOAKES & Co. *v.* DAY – – **C.A.** [1910] **1 Ch. 270, n.**

4. —— *Brewer's Lease—Tied House—Lessee's Covenant to buy Malt Liquors from Lessor—Rise in Prices—Breach of Covenant—Fair and reasonable Prices—Current Market Prices—Injunction—Form of Order.*

A tenant's covenant in a brewer's lease of a tied house not to sell on the demised premises any malt liquors other than such as shall have been purchased from the landlord imports an implied covenant by the landlord to supply malt liquors of good quality and at fair and reasonable prices.

Such a tenant's covenant was contained in the plaintiffs' lease of one of their tied houses in the London metropolitan area, and the defendant was the assignee of the lease. In June, 1909, in consequence of the increased licence duties proposed in the Finance Bill of that year, the plaintiffs and substantially all the London brewers (except a few small brewers) agreed to raise the price of beers 6*s.* a barrel to the trade, leaving the trade to recoup themselves by raising the retail price to the public one farthing per half-pint. The increased prices were agreed to by the trade generally, but the defendant refused to pay them and purchased his malt liquors elsewhere at the old prices. In an action by the plaintiffs to restrain the defendant from committing a breach of his covenant :—

Held, that under the circumstances the increased prices were fair and reasonable, and that the plaintiffs were entitled to an injunction.

Form of order in *Catt* v. *Tourle*, (1869) L. R. 4 Ch. 654, as stated in Seton on Judgments, 6th ed., vol. i. p. 534, not followed.

Quære as to the meaning to be attributed to the words "current market prices" in a landlord's covenant in such a lease. COURAGE & Co., LIMITED *v.* CARPENTER – **Neville J. 262**

5. —— *Execution — Judgment Creditor—Arrears of Rent — "Landlord" — "Rent"—Landlord and Tenant Act*, 1709 (8 *Anne*, *c.* 18), *s.* 1.

In 1896 a brewery company who were lessees of a public-house granted an underlease of the same to I., who mortgaged his interest to the plaintiff and gave a second mortgage to the company. In 1901 I. became bankrupt, and the defendant was appointed his trustee in bankruptcy. In 1902 the company went into possession as second mortgagees and let the public-house to a tenant who agreed to pay a rent of 150*l.* a year for the premises and an additional yearly sum of 125*0l.* in lieu of premium for goodwill. On March 8, 1909, the company obtained judgment against their tenant for 960*l.* and gave him a month's notice to determine his tenancy. On March 9, 1909, before the tenancy expired, the plaintiff commenced a foreclosure action against the defendant and the company, and on March 12 a receiver and manager was appointed, to whom the company was directed to give up possession. Later on the same day the sheriff levied execution in respect of the company's judgment debt :—

Held by Joyce J., that the receiver was "landlord" of the premises within the meaning of s. 1 of the Landlord and Tenant Act, 1709, and as such was entitled to be paid by the execution creditor one year's arrears of the rent ; and *held* by Joyce J. and the Court of Appeal, that the rent comprised the 150*l.* only, the 1250*l.* not being rent within the meaning of the statute. COX *v.* HARPER – – – – **C. A. 480**

6. —— *Lease—Covenant not to assign without Consent—Consent not to be withheld from "a respectable and responsible person"—Assignment to Limited Company after Consent refused—Forfeiture of Lease.*

A lessee covenanted to use the demised premises for the business of a jobmaster and livery stable keeper, and not to assign or underlet or part with the possession of the premises without the written consent of the lessor, which was not to be withheld from "a respectable and responsible person." The lessor having refused his consent to an assignment of the lease to a limited company whose solvency was not questioned, the lessee, on the ground that such refusal was unreasonable, let the company into possession of the demised premises :—

Held, that a limited company, i.e., a corporation, was not "a respectable and responsible person" within the meaning of the covenant, and that the lease was forfeited.

Harrison, Ainslie & Co. v. *Barrow-in-Furness Corporation*, (1891) 63 L. T. 834, followed. WILLMOTT *v.* LONDON ROAD CAR COMPANY, LIMITED – – – – **Neville J. 754**

—— Advowson—Lease of rectory—Pluralities Act, 1838 – – – – – **722**
See ECCLESIASTICAL LAW.

—— Lessor and lessee — Lease — Covenant—Licence to assign – – – **452**
See LESSOR AND LESSEE.

—— Mines and minerals—Lease of coal mines—Construction – – – – **766**
See MINES.

LANDS CLAUSES ACTS—Lands taken for public undertaking—Compensation for extinguishment of commonable rights. 552
See COMMON LANDS.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.
LESSOR AND LESSEE.

LEGACY—Will—Construction.
See under WILL.

LESSOR AND LESSEE — *Lease — Covenant — Licence to Assign—"Not to be unreasonably or arbitrarily withheld"—Unreasonable Condition—Declaratory Order—Costs.*

By a lease made in 1901 a house in Oxford Street was demised by the defendants to the predecessors of the plaintiff for thirty-one years, less fifteen days, at a rent of 450*l.* a year. The lease contained some onerous covenants, including a covenant by the lessees that they would not, without the licence in writing of the lessors (such licence not to be unreasonably or arbitrarily withheld), assign, transfer, or underlet the demised premises. In 1905 the plaintiff purchased the residue of the term in the lease and desired to assign it to his wife. The lessors objected to an assignment to a married woman, and would only grant their licence to assign on condition that the plaintiff executed a covenant for himself, his executors and administrators, at all times during the continuance of the lease of 1901 to pay the rent and perform all the covenants, agreements, and provisions contained in the said lease, as if he had been a party thereto.

Upon a summons in an action by the lessee against the lessors, the lessee claimed a declaration that he was entitled to assign the lease without the licence of the lessors, and free from conditions:—

Held, that the condition sought to be imposed by the lessors was altogether unreasonable, and the declaration asked would be made; but as no relief was sought against the lessors the declaratory order would be made without costs, according to the principle laid down by Swinfen Eady J. in *Jenkins* v. *Price*, [1907] 2 Ch. 229. EVANS *v.* LEVY - - - - - - **Eve J. 452**

—— Landlord and tenant.
See under LANDLORD AND TENANT.

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIMITATION—Executory bequest or limitation over on death of parent—Rule in *Wild's Case* - - - - - 167
See WILL. 6.

LIMITATIONS — Appointment — Validity — Remoteness — Rule against double possibilities—Successive limitations to unborn children—Election. 1
See SETTLEMENT. 5.

LIVERY COMPANY—Gift to Livery Company of city of London—Devise for general purpose of company. 426
See CHARITY. 2.

LOCAL GOVERNMENT—*Public Baths—Letting for Music and Dancing—Taking Money at the Doors—Baths and Washhouses Act*, 1899 (62 & 63 *Vict. c.* 29), *s.* 2.

By the Baths and Washhouses Act, 1899, the commissioners appointed under the Baths and Washhouses Acts, 1846 to 1899, are empowered to let public swimming baths, when closed, for music or dancing, subject to licence by the county council, but the Act provides that no money for admission be taken at the doors. The defendants, an urban district council, being commissioners under the Acts, obtained the requisite licence and let the baths in their district to persons who used them for entertainments comprising music, and at these entertainments money for admission was taken at pay-boxes placed on the defendants' land just outside the building. The hiring agreement between the defendants and their lessees contained a condition that no money should be taken at the doors.

In an action by the Attorney-General for an injunction to restrain the defendants from taking or permitting to be taken money at the doors:—

Held, that, there being no provision in the Act making the commissioners responsible for the acts of their lessees, the Court would not compel the defendants to take proceedings against their lessees at the risk of a decision that what was done by them was not an unlawful evasion of the Act; and, the defendants not claiming the right to take money at the doors, or to authorize their lessees to do so, no injunction ought to be granted. ATTORNEY-GENERAL *v.* WALTHAMSTOW URBAN DISTRICT COUNCIL **Joyce J. 347**

—— Streets.
See under STREETS.

LOCAL GOVERNMENT BOARD—Approval of—Corporate lands—Power to sell - 68
See CORPORATION.

LOCAL SANITARY AUTHORITY — Natural stream — Pollution — Sewage works — Discharge of injunction on subsequent facts - - - - - 48
See STREAM.

LONDON—Livery Company of city of London, Gift to—Devise for general purposes of company - - - - - 426
See CHARITY. 2.

MARRIAGE — Will — Construction — Gift of income to daughter until marriage—Gift over on marriage — Death of daughter unmarried - - - 695
See WILL. 5.

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MARSHALLING—Estate duty — Testamentary expenses—Insufficient general personal estate to pay duty – – – **564**
See REVENUE. 2.

MEETINGS — Company — General meeting — Special business—Minutes — Notice — Sufficiency—Resolutions – – **430**
See COMPANY. 4.

MICHAEL ANGELO TAYLOR'S ACT – **35**
See STREETS.

MINES –*Lease of Coal Mines—Construction—Covenant to work "in a fair, proper, and workmanlike manner and according to the best mode of working for the time being adopted in the neighbourhood"—Covenant not to injure Working of Seams next beneath or next above—Mines and Minerals.*

Leases of seven seams of coal for mining purposes contained covenants by the lessees to work the coal "in a fair, proper, and workmanlike manner and according to the best mode of working for the time being adopted in the neighbourhood," and to work the seams "so as not to injuriously affect or make it more difficult and expensive to work the seam or seams lying next beneath or next above," and not to injure or endanger buildings by undermining their foundations or by the working. In the neighbourhood of the mines the system of working usually adopted was the "long wall" system, or the "Barry" system (a modification of it), under which systems all the coal was worked and no pillars were left. In an area of forty-two acres, beneath a village in which there were many houses, the lessees worked the lower vein of the two into which the seam there lying was divided on the "pillar and stall" system, under which many large pillars of coal were left to support the surface and houses :—

Held, (1.) that in arriving at the meaning of what was "fair, proper, and workmanlike" working all the circumstances must be considered, including the lessees' obligation to support the surface; (2.) that the "best mode of working" meant the best under all the circumstances, and that even the system in general use, if meant, was only to be used where applicable; (3.) that the "pillar and stall" system was properly used under the area of forty-two acres; and (4.) that the covenant as to working seams without injury to others applied to the seven seams demised and not to the two veins of one seam. BREWER *v.* RHYMNEY IRON COMPANY
Parker J. 766

MORTGAGE—*Bank—Mortgage to secure Current Account—Subsequent Mortgage—Appropriation of Payments—Rule in* Clayton's Case.

The rule in *Clayton's Case*, that payments carried by a creditor to a current account which is communicated to the debtor are to be appropriated to liabilities in order of date, is founded on a presumption of the creditor's intention and will not be applied in a case where it is proved by the conduct of the parties that the creditor had no such intention.

In September, 1893, G. mortgaged property to a bank to secure an overdraft on his current account limited to 2500*l*. The bank held other security for the overdraft to the amount of 1000*l*. In 1895 G. mortgaged the same property to D. to secure 3500*l*. This mortgage recited the mortgage to the bank and was expressly made subject to it. Notice was given to the bank, but they continued the current account with G. instead of opening a fresh account. G. from time to time made payments to his account which, if applied according to the rule in *Clayton's Case*, would have paid off the moneys due at the date of the second mortgage by January 6, 1896. The bank never allowed G. to overdraw beyond the limit of 3500*l*. for which they held security, except temporarily on deposit of fresh security. G. also often appropriated payments in to meet particular cheques. D., through her husband, who was her agent and acted as solicitor for G., had full notice of all the dealings between G. and the bank. G. was made bankrupt in 1899, and the bank in that year realized their security for a price just sufficient to pay them the amount due. D. did not at that time complain, and her husband procured from the bank a release of a guarantee of their mortgage given by T. G., and thereupon D. got a release of a counter-guarantee given by her to T. G.

In April, 1905, D. commenced this action for an account against the bank on the footing that they were not entitled to charge for advances made to G. after notice of the mortgage to D. :—

Held by Fletcher Moulton and Buckley L.JJ. (dissentiente Cozens-Hardy M.R.), that there was sufficient evidence to shew that the bank had not intended to appropriate the payments in discharge of the debts secured by the mortgage and that the rule in *Clayton's Case* did not apply. Decision of Eve J. affirmed.

Clayton's Case, (1816) 1 Mer. 572, and *Hopkinson* v. *Rolt*, (1861) 9 H. L. C. 514, discussed. DEELEY *v.* LLOYDS BANK – – **C. A. 648**

2. —— *"Clog" on Redemption—Public-house—"Tie"—Restrictive Covenant by Mortgagor—Proviso against Redemption without Consent of Mortgagee for Twenty-eight Years.*

In 1896 a lessee of land on which he had built a hotel mortgaged it to a brewer to secure 5500*l*. and interest, and covenanted to buy all beer and other liquors consumed at the house from the mortgagee for a period of twenty-eight years and so long after as any money should remain due upon the security. The deed also provided that the mortgagor should not be entitled to pay off the mortgage before 1924 without the consent of the mortgagee. There was a power of sale without notice upon the happening of any one of numerous events, and upon a sale under the power the purchaser might be required to take a conveyance subject to the "tie." In an action by the mortgagor to redeem the mortgage :—

Held, that the proviso against redemption for twenty-eight years, even if it might be supported in a case where there was a similar provision against calling in the mortgage, exceeded all reasonable limits and could not be enforced. MORGAN *v.* JEFFREYS **Joyce J. 620**

MORTGAGE—*continued.*

3. —— *Foreclosure absolute—Puisne Incumbrancer—Consent Order—Effect—Right to sue on Covenant in Mortgage—Condition Precedent—Demand in Writing—Following Assets in Hands of Residuary Legatees and Devisees of Mortgagor—Judgment against Heir-at-Law—Form of Order—Debts Recovery Act*, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 47), *s.* 3.

Where various parties to an action agree an order purporting to be a consent order, the agreement must be treated as embodying terms to which all assent, and by which all are bound.

A puisne incumbrancer who voluntarily submits to a foreclosure order absolute being made upon an originating summons, without insisting upon his right to have a time allowed within which to redeem a prior incumbrancer, does not thereby preclude himself from suing on the covenant for payment in the mortgage deed, and recovering his debt from the residuary legatees and devisees of the deceased mortgagor.

A mortgage of a leasehold public-house by a testatrix contained a covenant that she, or those deriving title under her, would, upon demand in writing left at the public-house, repay the principal sum advanced with interest. No demand in writing was ever made on the premises:—

Held, that effect was given to the true intention of the parties to the deed if it was brought home to the mortgagor, or those claiming under her, that the mortgagees were demanding their money, and were about to take proceedings to recover it. WORTHINGTON & Co., LIMITED *v.* ABBOTT - - - - - - **Eve J. 588**

—— Broker and client—Purchase of shares—Carry over—Mortgage of shares—Blank transfer — Implied power of sale — Wrongful conversion - - - **632**
See STOCK EXCHANGE.

—— Clog on equity of redemption—Chartered company—Contract to issue debentures—Floating charge on foreign land **354**
See CONFLICT OF LAWS.

—— Partnership—Mortgage of partner's interest — Right of mortgagee to account — Arbitration clause—Stay of proceedings
See PARTNERSHIP. 2. **732**

—— Tenant for life—Power to appoint portions — Disentailing deed — Mortgage of settled estates — Priority — Implied release of power - - - **297**
See SETTLEMENT. 7.

MOTION — Costs — Taxation — Speedy trial — Counsel's fees - - - **410**
See PRACTICE. 2.

MUNICIPAL CORPORATION.
See under CORPORATION.

NAME—Trade name.
See under TRADE NAME.

NAME AND ARMS CLAUSE—Settlement of real estate — Condition subsequent requiring assumption of name and arms — Infant - - - - - **541**
See SETTLEMENT. 3.

NATIONAL SCHOOL.
See under SCHOOL.

NAVAL (ROYAL) SCHOOL ACT, 1840 - **806**
See INFANT.

"NET" — Commission — "Net" charge including broker's remuneration and contango—Non-disclosure to client—Secret profit - - - - - **632**
See STOCK EXCHANGE.

NEXT OF KIN — Agreement to settle wife's after-acquired property—Next of kin claiming benefit of covenant - **609**
See SETTLEMENT. 1.

—— Will—Class—"Next of kin whoever they may be" - - - - - **278**
See WILL. 4.

NOTICE—Company—Executors—Production of probate — Transfer to one executor — Nominal consideration — Breach of trust - - - - - **444**
See COMPANY. 7.

—— Company — General meeting — Special business — Minutes — Notice — Sufficiency—Resolutions - - - **430**
See COMPANY. 4.

—— Compulsory purchase—Widening street—Notice to treat—Withdrawal—Compensation - - - - - **35**
See STREETS.

—— Expulsion—Validity—Partner, Breach of duty as - - - - - **495**
See PARTNERSHIP. 1.

—— Trade mark—Register of trade marks **257**
See TRADE MARK. 1.

NOVATION—Release of principal debtor—Discharge of surety - - - **464**
See PRINCIPAL AND SURETY.

ORIGINATING SUMMONS — Vendor and purchaser summons — Forcing doubtful title - - - - - **43**
See VENDOR AND PURCHASER. 4.

PARTIES—Covenant by covenantor with himself and others—Joint right to enforce obligation—Validity - - - **529**
See CONTRACT.

—— Trade name — Passing-off action — Injunction - - - - - **248**
See TRADE NAME.

PARTNERSHIP—*Breach of Duty as Partner—Expulsion—Notice—Validity.*

A deed of partnership provided that, in the event of either partner committing any breach

PARTNERSHIP—*continued.*

of the partnership articles or any other flagrant breach of his duties as a partner, the other partner might by notice in writing terminate the partnership, provided that if any question should arise whether a case had happened to authorize the exercise of his power it should be determined by arbitration, if the offending partner so requested in writing within a given time. Under this clause one partner, without any preliminary warning to his co-partner, served him with a notice of dissolution on the ground that he had committed breaches of certain specified articles and had also committed a flagrant breach of his duties as a partner:—

Held (affirming the decision of Neville J.), that, in the absence of mala fides, it was not a condition precedent to the validity of the notice that the partner serving the notice should before serving it disclose to his co-partner the causes of complaint against him or give him an opportunity of being heard in his defence, and that the notice was valid.

Dicta of Romer J. in *Barnes* v. *Youngs*, [1898] 1 Ch. 414, overruled. GREEN *v.* HOWELL **C. A. 495**

2. —— *Mortgage of Partner's Interest — Right of Mortgagee to Account — Arbitration Clause — Stay of Proceedings — Discretion— Appointment as Arbitrators of strong Supporters of each Party—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 31, *sub-s.* 2.

A partnership deed between three partners contained a power for any two partners by notice to determine the partnership so far as the third partner was concerned if he did not keep up his capital. It also contained a clause providing for arbitration in the usual way "if any difference shall arise between the said partners or between one or more of them and the executors or administrators of the others or other of them or between their respective executors or administrators." Two of the partners had given notice to the third, and it was admitted that the partnership had been determined so far as he was concerned. Before this determination the outgoing partner had mortgaged his share. Questions had arisen as to the right of the continuing partners to purchase the outgoing partner's share, and the amount of his interest in the goodwill, which depended on the construction of the partnership deed. The continuing partners gave notice to the outgoing partner that they had appointed an arbitrator and requiring him to do the same. He did this, and the arbitrators agreed on an umpire, but nothing more had been done in the arbitration. The mortgagees brought this action against all three partners for an account of the outgoing partner's share from the date of dissolution. The continuing partners moved for a stay of proceedings under the Arbitration Act, 1889, s. 4:—

Held, that the right of the mortgagees to an account was an independent right, given by the Partnership Act, and not depending upon the partnership deed; that, the arbitration clause not including in terms persons claiming under the partners, the mortgagees were not bound by

PARTNERSHIP—*continued.*

the clause and would not be bound by any account taken in the arbitration, and therefore their action for an account could not be stayed.

The Court has a discretion as to staying proceedings under s. 4 of the Arbitration Act, and the facts that there are questions of law to be decided, and, *semble*, that the arbitrators appointed are each of them partisans who have expressed strong opinions in their respective appointor's favour, are reasons for not exercising the discretion by staying proceedings. BONNIN *v.* NEAME - - - **Swinfen Eady J. 732**

PASSING-OFF ACTION—Trade name—Parties—Injunction - - - - **248**
See TRADE NAME.

PASTURE LANDS—Covenant not to plough up—Good husbandry - - - **437**
See LANDLORD AND TENANT. 1.

PAYMENT—Specific performance—Default in payment by purchaser—Forfeiture of deposit—Form of order - - **176**
See VENDOR AND PURCHASER. 2.

PENSION—Company—Ultra vires—Gratuitous payment—Pension to retired officer **179**
See COMPANY. 8.

PERPETUITY—Railway—Severed lands—Grant of right to make "a tunnel"—Uncertainty—Assignability - - - **12**
See RAILWAY.

PLAN—Conveyance - - - - **741**
See VENDOR AND PURCHASER. 1.

PLURALITIES ACT—Lease of rectory—Omission of statutory "condition for avoiding the same" on bishop ordering personal residence—Void or voidable
See ECCLESIASTICAL LAW. **722**

POLICY—Life assurance company—Liquidation—Transfer of business to another company—Deposit—Repayment—Rights of policy-holders - - - - **458**
See INSURANCE (LIFE).

PORTIONS—Tenant for life—Power to appoint portions—Disentailing deed—Mortgage of settled estates—Priority - - **297**
See SETTLEMENT. 7.

POSSESSION—Power of revocation—Person entitled to the "actual possession" - **290**
See SETTLEMENT. 4.

POSSIBILITIES—Appointment—Remoteness—Rule against double possibilities—Election - - - - - **1**
See SETTLEMENT. 5.

POWER—Revocation.
See under REVOCATION.

POWER OF APPOINTMENT—*Married Woman—Settlement—General Power to Appoint by Will—Event in which Power to arise—Non-occurrence—Exercise of Power during Coverture*

POWER OF APPOINTMENT—*continued.*

—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 3—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.

Under a marriage settlement property was settled upon trust for the wife and her husband for life, and if there should be no children and the husband should die in the lifetime of the wife (both of which events happened), then after his death in trust for her absolutely. Then followed a trust, in the event of the husband surviving the wife, giving her (subject to his life interest) a general power of appointment by will notwithstanding coverture, and subject thereto the trust funds were to go to her next of kin. The husband died in 1905 and the wife in 1908. By her will, dated in 1895, the wife, in exercise of the power and of all other powers (if any) thereunto enabling her, appointed that the trustees should after the death of her husband stand possessed of the property subject to the settlement for certain named persons, and, after making specific bequests, she gave her residue to her husband absolutely :—

Held, that the effect of s. 3 of the Married Women's Property Act, 1893, was to make the will operate upon all that the testatrix had at her death ; that at her death, in the events which happened, the settled property was held upon trust for her and passed to the appointees as a specific disposition under her will. *In re* JAMES. HOLE *v.* BETHUNE – **Joyce J. 157**

—— Appointment—Specific sums of stock—Surrender of appointor's life interest—Hotchpot – – – – – **78**
See SETTLEMENT. 2.

—— Appointment — Validity — Remoteness — Rule against double possibilities—Successive limitations to unborn children—Election – – – – – **1**
See SETTLEMENT. 5.

—— Estate duty — Appointment of specified amounts—Residue of fund—Incidence—Will – – – – – **63**
See REVENUE. 1.

—— Tenant for life—Power to appoint portions — Disentailing deed — Mortgage of settled estates—Priority – – **297**
See SETTLEMENT. 7.

POWER OF SALE—Mortgage of shares—Blank transfer — Implied power of sale — Wrongful conversion – – – **632**
See STOCK EXCHANGE.

—— Will—Trusts of real estate—Conversion after death of heir-at-law—Real or personal estate – – – – **750**
See WILL. 10.

PRACTICE—*Appeal—Time for Appealing—Dismissal of Action as frivolous and vexatious—Interlocutory or Final Order—Rules of the Supreme Court, Order XXV., r.* 4 ; *Order LVIII., r.* 15.

An order dismissing an action as frivolous and vexatious is for the purposes of appeal an interlocutory order. *In re* PAGE. HILL *v.* FLADGATE – – – – – **C. A. 489**

2. —— *Costs — Taxation — Motion — Speedy Trial—Motion heard with Witnesses and treated as Trial—Counsel's Fees—Rules of the Supreme Court, Order LXV., r.* 27, *sub-r.* 47.

The plaintiff moved in an action for an interim injunction, and the Court directed that the motion should be heard with witnesses and treated as the trial of the action. The plaintiff's solicitors delivered fresh briefs to counsel as for the trial of the action. On February 24, 1909, at the hearing the case was compromised on terms which included a stipulation that one of the defendants should pay the plaintiff's costs. The judgment, which embodied the terms of the compromise, commenced as follows : "Upon motion on the 5th and 12th February 1909 and this day made unto the Court by counsel for the plaintiff which motion was on the 12th February 1909 ordered to be set down for hearing on the 18th February 1909 as a motion with witnesses, to be treated as the trial of the action, and upon reading," &c. The taxing Master allowed the fees marked on the briefs delivered on the motion, but disallowed half the fees marked on the fresh briefs of counsel for the plaintiff, and the plaintiff took out this summons to vary his certificate :—

Held, that, inasmuch as the motion was not disposed of till the hearing on February 24, the taxing Master was right. COOKSON *v.* CATTON **Warrington J. 410**

3. —— *Vesting Order—Infant—Stock in Name of Infant and another to which Infant is entitled—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 35, *sub-s.* 1 (ii.) (*a*)—*Infants Property Act*, 1830 (11 *Geo.* 4 & 1 *Will.* 4, *c.* 65), *s.* 32—*Form of Order.*

Where stock to which an infant was beneficially entitled had been invested in the joint names of himself and another person :—

Held (reversing the decision of Joyce J.), that the Court had jurisdiction under s. 35, sub-s. 1 (ii.) (*a*), of the Trustee Act, 1893, notwithstanding some slight difference in the language of this section and sub-sections as compared with s. 3 of the Trustee Extension Act, 1852, to make an order vesting the right to transfer such stock in the infant's guardian.

Per Farwell L.J. : The words "(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—(*a*) is an infant," apply to a case where one of the trustees is an infant and the stock is held in trust for the infant.

In re Harwood, (1882) 20 Ch. D. 536, and *In re Barnett's Estate*, [1889] W. N. 216, approved. *In re* DEHAYNIN (INFANTS) **C. A. 223**

—— Parties—Trade name—Passing-off action—Injunction – – – – **248**
See TRADE NAME.

PRECATORY TRUST—"I specially desire"—Absolute gift—Gift on condition—Precatory trust for charity – – **219**
See WILL. 2.

PRECATORY TRUST—*continued.*

—— "I wish"—Absolute gift—Codicil directing use of legacy for charitable purposes – – – – – **215**
See WILL. 1.

PRINCIPAL AND SURETY—*Novation—Release of Principal Debtor—Discharge of Surety.*

In 1903 P. as surety executed mortgages of certain property of his own to a bank to secure the overdraft of P. Brothers, a firm in which he was not a partner. The mortgage deeds all contained a provision that the bank should be at liberty without affecting their rights under the mortgages (among other things) "to vary exchange or release any other securities held or to be held by the bank for or on account of the moneys thereby secured or any part thereof" . . . . "and to compound with, give time for payment of, and accept compositions from and make any arrangements with the debtors or any of them."

In 1908 P. Brothers, being insolvent, called their creditors together, and a scheme was arranged whereby a company was formed who should take over certain properties of the firm for realization and should issue debentures to the creditors at the rate of 25*s.* for each 1*l.* of their debts in full discharge thereof. The bank in accordance with this scheme applied for debenture stock on a form which contained an express agreement by the applicants to accept such debenture stock in full discharge of all their claims against P. Brothers. The amount of the debt in respect of which debenture stock was to be issued was 1900*l.* This amount was arrived at by deducting from the total debt due to the bank 1630*l.*, the value put upon securities held by them on the property of the firm; but no deduction was made on account of P.'s mortgages. The interest on the debenture stock not having been paid, the bank threatened to sell the property comprised in P.'s mortgages. In an action by P. for reconveyance of the mortgaged property on the footing that nothing was due on the mortgage:—

Held, varying the decision of Neville J., that as to the 1900*l.* the debt was completely discharged and therefore the surety's property was released; but that as to the 1630*l.* the debt remained unpaid, although the principal debtor was released; consequently that by the express terms of the mortgage deeds the surety's property continued liable.

Cowper v. *Smith*, (1838) 4 M. & W. 519, and *Union Bank of Manchester* v. *Beech*, (1865) 3 H. & C. 672, followed.

Commercial Bank of Tasmania v. *Jones*, [1893] A. C. 313, distinguished.

PERRY *v.* NATIONAL PROVINCIAL BANK OF ENGLAND – – – – **C. A 464**

PRIORITY — Company — Loan by bank — Receiver's remuneration — Costs of preservation and realization – – **519**
See COMPANY. 2.

—— Tenant for life—Power to appoint portions — Disentailing deed — Mortgage of settled estates – – – – **297**
See SETTLEMENT. 7.

PROBATE — Company — Shares — Executors—Production of probate—Transfer to one executor — Nominal consideration — Breach of trust – – – **444**
See COMPANY. 7.

PROMISE—Imperfect gift of personalty—Indefinite gift—Promise to pay in the future – – – – – **188**
See ADMINISTRATION. 2.

PROSPECTUS—Company.
See under COMPANY.

PUBLIC HEALTH—Stream, Natural—Pollution—Sewage works—Discharge of injunction on subsequent facts – – **48**
See STREAM.

PUBLIC-HOUSE — Mortgage — "Clog" on redemption — "Tie" — Restrictive covenant by mortgagor – – – **620**
See MORTGAGE. 2.

PURCHASE—Compulsory purchase—Widening street—Notice to treat—Withdrawal—Compensation – – – – **35**
See STREETS.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

QUIET ENJOYMENT — Covenant for — Tenant for life—Power to appoint portions—Mortgage of settled estates—Priority—Implied release of power – – **297**
See SETTLEMENT. 7.

RAILWAY—*Accommodation Works—Agreement—Severed Lands—Grant of Right to make "a Tunnel"—Place and Time indefinite—Personal Contract — Interest in Land — Uncertainty — Perpetuity—Ultra vires—Assignability—Railways Clauses Consolidation Act*, 1845 (8 *& 9 Vict. c.* 20), *s.* 71.

By an accommodation works agreement of May 31, 1847, a railway company, who were purchasing a strip of land for their line, agreed that the landowner, his heirs, appointees, or assigns, might at any time thereafter at his or their own expense make a tunnel thereunder to join the lands severed thereby. The company also agreed to make a certain defined level crossing.

On December 31, 1847, the landowner conveyed the strip to the railway company, reserving to himself, his heirs, appointees, and assigns, the defined level crossing and the right to make a tunnel at his or their own expense, the level crossing and the privilege of making a tunnel being accepted in lieu of all other accommodation works. The site of the tunnel was in no way defined:—

Held, affirming Swinfen Eady J.—(1.) that as against the original covenantors, the railway company, the provision in the agreement as to the tunnel was a personal contract and was not obnoxious to the rule against perpetuities.

London and South Western Ry. Co. v. *Gomm*, (1882) 20 Ch. D. 562, explained and distinguished.

RAILWAY—*continued.*

(2.) That the benefit of that contract could be specially assigned to a lessee of part of the severed lands during the continuance of the lease.

Held, further, by Swinfen Eady J.—(*a*) that as the agreement and reservation amounted to a regrant of an easement by the railway company to the landowner, and not to an exception out of the land granted by him to the company, the right to select the site of the tunnel was vested in the landowner, his heirs, appointees, and assigns, and the agreement and reservation were not void for uncertainty.

Saunderson v. *Cockermouth and Workington Ry. Co.*, (1849) 11 Beav. 497; (1850) 2 H. & T. 327, 331, applied.

Pearce v. *Watts*, (1875) L. R. 20 Eq. 492, and *Savill Brothers, Ld.* v. *Bethell*, [1902] 2 Ch. 523, explained and distinguished.

(*b*) That the grant of the easement was not ultra vires.

In re Gonty and Manchester, Sheffield, and Lincolnshire Ry. Co., [1896] 2 Q. B. 439, applied.

(*c*) That the agreement was also valid as an agreement for a further accommodation work under s. 71 of the Railways Clauses Consolidation Act, 1845. SOUTH EASTERN RAILWAY COMPANY *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED **C. A. 12**

RECEIVER—Loan by bank—First charge by deed—Realization—Insufficient assets—Receiver's remuneration—Costs—Priorities – – – – – **519**
See COMPANY. 2.

RECTORY—Lease of—Advowson—Pluralities Act, 1838 – – – – – **722**
See ECCLESIASTICAL LAW.

REDEMPTION—Mortgage.
See under MORTGAGE.

REDUCTION OF CAPITAL.
See under CAPITAL.

REGISTRATION—Company—Winding-up—Contributory—Power of directors to refuse registration – – – **312**
See COMPANY. 9.

—— Land transfer—Conditions annexed to title – – – – – **325**
See VENDOR AND PURCHASER. 3.

—— Trade mark.
See under TRADE MARK.

RELEASE—Principal and surety—Novation—Release of principal debtor—Discharge of surety – – – – – **464**
See PRINCIPAL AND SURETY.

—— Tenant for life—Power to appoint portions—Disentailing deed—Mortgage of settled estates—Implied release of power – – – – – **297**
See SETTLEMENT. 7.

REMOTENESS—Appointment—Rule against double possibilities—Election – **1**
See SETTLEMENT. 5.

RENT—Landlord and tenant.
See under LANDLORD AND TENANT.

RENT-CHARGE—Corporate lands—Power to sell—Consideration—Perpetual rent-charge – – – – – – **68**
See CORPORATION.

—— Jointure—Arrears—"Incumbrance affecting the inheritance"—Discharge out of capital moneys – – – – **106**
See SETTLED LAND. 1.

RESIDUE—Estate duty—Incidence—Appointment of specified amounts—Residue of fund—Will – – – – **63**
See REVENUE. 1.

—— Share of residue—Absolute gift—Subsequent provision for settlement of married daughter's share – – **329**
See WILL. 8.

—— Will and codicil—Implied revocation **681**
See WILL. 7.

RESTRAINT ON TRADE—Director—Contract of service—Winding-up—Repudiation—Specific performance – – **336**
See COMPANY. 3.

RESTRICTIVE COVENANTS.
See under COVENANT.

REVENUE — *Estate Duty — Settled Fund — Special Power — Appointment of specified Amounts—Of the "clear" Amount or Value—Residue of Fund—Incidence—Will—Construction.*

By his will, made in 1883, the donee of a special power of appointment over a settled trust fund directed that certain portions of the fund "of the clear amount or value," and, subsequently, "of the like amount or value," therein specified should be appropriated and retained upon the trusts therein declared in favour of certain objects of the power, and that the residue of the fund should be appropriated and retained upon trust for another object. The donee died in 1906:—

Held, that the words "of the clear amount or value" and "of the like amount or value" exempted from estate duty the portions of the fund in respect of which those words were used, and that such duty must be borne by the residue of the fund.

In re Currie, (1888) 57 L. J. (Ch.) 743; 36 W. R. 752, and *In re Saunders*, [1898] 1 Ch. 17, applied. *In re* COXWELL'S TRUSTS. KINLOCH-COOKE *v.* PUBLIC TRUSTEE – **Joyce J. 63**

2. —— *Estate Duty — Testamentary Expenses — Insufficient General Personal Estate to pay Duty—Specifically bequeathed Personalty—Undisposed-of Realty—Order of Administration of Assets — Marshalling — Finance Act*, 1894 (57 & 58 *Vict. c.* 30)—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65).

Estate duty, which under the Finance Act, 1894, is payable in respect of personal property specifically bequeathed by a testator, being a testamentary expense, is payable in the same

REVENUE—*continued.*

order of administration as other testamentary expenses are payable, and accordingly where the residuary personal estate is insufficient to pay the estate duty on the specifically bequeathed personalty the heir-at-law is not entitled to have the duty paid out of such personalty in exoneration of the undisposed-of realty.

Shepheard v. *Beetham*, (1877) 6 Ch. D. 597, distinguished. *In re* PULLEN. PARKER *v.* PULLEN – – – – **Warrington J. 564**

REVERTER—Site for school—Gift of land for education of poor—Discontinuance of weekday school – – – – **92**
See CHARITY. 5.

REVOCATION—Power of—Person entitled to the "actual possession" – – **290**
See SETTLEMENT. 4.

—— Will and codicil—Implied revocation **681**
See WILL. 7.

ROYAL NAVAL SCHOOL ACT, 1840 – **806**
See INFANT.

RULES OF SUPREME COURT:—
ORDER XXV. (Proceedings in lieu of demurrer), r. 4 – – – – **489**
See PRACTICE. 1.
(Appeals to the Court of Appeal), r. 15 – – – – – **489**
See PRACTICE. 1.
ORDER LXV. (Costs), r. 27, sub-r. 47 **410**
See PRACTICE. 2.

SALE—Corporate lands—Power to sell—Consideration—Approval of Local Government Board – – – – **68**
See CORPORATION.

—— Exercise of implied power of sale—Reasonable notice to mortgagor – **195**
See STOCK EXCHANGE. 1.

—— Jointure rent-charge—Arrears—"Incumbrance affecting the inheritance"—Discharge out of capital moneys—Irish Land Acts – – – – **106**
See SETTLED LAND. 1.

—— Power of sale.
See under POWER OF SALE.

—— Settled land.
See under SETTLED LAND.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

SCHOOL—Charitable trust—Scheme—Religious instruction—Government grant—Board of Education—Modification of scheme to meet regulations of Board—Jurisdiction – – – – – **796**
See CHARITY. 4.

—— Corporation—Membership—Local Act—Construction—"Any person"—Royal Naval School Act, 1840 – – **806**
See INFANT.

SCHOOL—*continued.*

—— Site for—Gift of land for education of poor—Discontinuance of weekday school—Reverter – – – **92**
See CHARITY. 5.

—— Trust for benefit of national school—Gift over on school board or representative body under the Education Acts being formed for the parish – – **272**
See SETTLEMENT. 6.

SECRET PROFIT—Broker and client—Purchase of shares—"Net" charge – – **632**
See STOCK EXCHANGE. 2.

SECURITY FOR COSTS.
See under COSTS.

SETTLED ESTATE—Tenant for life and remainderman—Profits of business—Capital or income – – – **814**
See WILL. 9.

SETTLED LAND—*Jointure Rent-charge—Arrears—"Incumbrance affecting the inheritance"—Discharge out of Capital Moneys—Discretion of Court—Tenant for Life and Remainderman—Incidence—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 21, *sub-s.* ii.—*Settled Land in Ireland—Sale—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37)—*Irish Land Act*, 1904 (4 *Edw.* 7, *c.* 34).

Arrears of a jointure rent-charge, which was limited and secured by powers of entry and distress and by a term of years and trusts thereof in the usual way, are an "incumbrance affecting the inheritance of the settled land" within the meaning of s. 21, sub-s. ii., of the Settled Land Act, 1882, and may in a proper case, where their discharge would be the wisest course for all concerned, be discharged by the trustees of the settlement out of capital moneys in their hands, but conditionally upon the tenant for life agreeing that such payment shall be without prejudice to the question, should it arise, of the ultimate incidence of the liability for the arrears as between himself and the remainderman.

The dicta in *In re Knatchbull's Settled Estate*, (1884) 27 Ch. D. 349, and in *In re Frewen*, (1888) 38 Ch. D. 383, relating to the redemption of a jointure rent-charge under s. 21, sub-s. ii., considered and distinguished.

In re DUKE OF MANCHESTER'S SETTLEMENT – – – – – **Eve J. 106**

2. —— *Sale by Tenant for Life—Concurrence of Parties—Incumbrancers on Fee—Incumbrancers on Life Estate—Sale by Auction in Lots—Separate Transactions—Costs—Taxation—Duties of Trustees—Capital Money—Investment in Stock—Dividends declared but not paid—Right of Tenant for Life to Dividends—Solicitors Remuneration Act*, 1881 (44 *&* 45 *Vict. c.* 44)—*General Order, August*, 1882, *clause* 6—*Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 21, 22, 50, *sub-s.* 3; *s.* 53.

In giving a direction under s. 22, sub-s. 2, of the Settled Land Act, 1882, the tenant for life is bound to act as a trustee.

SETTLED LAND—*continued.*

The rule laid down in *Cardigan* v. *Curzon-Howe*, (1889) 41 Ch. D. 375, that on a sale by a tenant for life under the Settled Land Act the costs of obtaining the consent and concurrence of the mortgagees on his life estate ought not, as a general rule, to be paid out of capital moneys, applies as well where the capital moneys are in the hands of trustees as where they are in Court.

Where a tenant for life, who has sold under the Settled Land Act, 1882, directs capital moneys in the hands of the trustees to be applied in payment of the costs, charges, and expenses of his solicitors in relation to the sale, the trustees are not bound to have such costs, charges, and expenses taxed, but are entitled to have an opportunity of considering their propriety, and if satisfied may without taxation pay them out of capital moneys.

The same rule applies to the payment out of capital moneys of the costs of procuring the concurrence in the sale of the incumbrancers on the fee.

Where property is offered by a tenant for life for sale in lots the tenant for life is vendor in respect of each contract of sale into which he eventually enters, and in such a case it is competent to the vendor's solicitor, who, before entering upon the business, has given the necessary notice under r. 6 of the General Order under the Solicitors Remuneration Act, 1881, of his intention to charge the ordinary detailed charges and not the scale fee in the case of sales under a certain amount, to treat the sale of each lot as a separate transaction, and to charge his costs accordingly.

Where upon a direction by a tenant for life trustees have invested capital moneys in their hands in the purchase of stocks on which at the date of purchase dividends have been earned and declared but not paid, the tenant for life is not entitled to such dividends.

Bulkeley v. *Stephens*, [1896] 2 Ch. 241; *Scholefield* v. *Redfern*, (1863) 2 Dr. & Sm. 173; and *Freman* v. *Whitbread*, (1865) L. R. 1 Eq. 266, distinguished.

In re SIR ROBERT PEEL'S SETTLED ESTATES
Warrington J. 389

—— Estate duty—Incidence—Settled fund—Appointment of specified amounts—Residue of fund – – – **63**
See REVENUE. 1.

—— Tenant for life—Power to appoint portions—Disentailing deed—Mortgage of settled estates—Priority – – **297**
See SETTLEMENT. 7.

SETTLEMENT — *After-acquired Property — Agreement to settle Wife's—Gift from Husband to Wife—Volunteers—Next of Kin claiming Benefit of Covenant—Trustees not bound to enforce Transfer—Marriage Settlement.*

By a marriage settlement made in 1878 certain funds coming from the wife's father were settled upon the usual trusts of a wife's fund, with an ultimate trust, in the events which happened, for the wife's statutory next of kin. And it was also agreed that all real and personal

SETTLEMENT—*continued.*

property to which the wife was entitled at the date of the marriage, or to which she, or her husband in her right, at any time during the coverture, should be or become entitled, whether in possession, reversion, or otherwise, should be assured and transferred by the husband and wife respectively to the trustees to be held upon the trusts of the settlement.

In August, 1884, a sum of 1018*l.* 15*s.* was invested by the husband in the purchase of certain stock in the name of the wife. This was subsequently sold by the wife and reinvested in the purchase of 1125*l.* Grand Trunk Railway of Canada 4 per cent. debenture stock, which remained registered in her name down to the date of her death, intestate, and without leaving any issue, on February 2, 1909. The stock was now standing in the name of the husband, to whom letters of administration to his wife's estate had been granted:—

Held, that the stock in question, which was a gift by the husband to the wife, was caught by the agreement to settle the wife's after-acquired property.

In re Ellis's Settlement, [1909] 1 Ch. 618, followed.

But *held*, on the authority of *Spickernell* v. *Hotham*, (1854) Kay, 669, that no action could be brought by the trustees to recover damages against the husband or the estate of the wife.

Held, also, that the next of kin of the wife, being volunteers and strangers to the marriage consideration, could not enforce the contract to settle as against the administrator of the wife, and that therefore the trustees were not bound to take any steps to obtain a transfer of the stock.

In re D'Angibau, (1880) 15 Ch. D. 228, followed.

Fletcher v. *Fletcher*, (1844) 4 Hare, 67, distinguished. *In re* PLUMPTRE'S MARRIAGE SETTLEMENT. UNDERHILL *v.* PLUMPTRE
Eve J. 609

2. —— *Appointment of Specific Sums of Stock—Surrender of Appointor's Life Interest—Immediate Possession—Death of Appointor—Hotchpot—Date at which Value of Appointed Stocks should be ascertained.*

By the marriage settlement of Mr. and Mrs. Kelly stocks were assigned to trustees upon trust for Mrs. Kelly for life, and after her death (in the events which happened of her surviving her husband and no joint appointment by them having been made) then upon trust for such of the issue of the marriage as the survivor of them should by deed or will appoint, and in default of such appointment in trust for the children of the marriage in equal shares. The settlement contained a hotchpot clause in common form.

Mrs. Kelly on the occasion of the marriage of one of her daughters appointed that certain sums of stock forming part of the settlement trust fund should immediately after the marriage be held in trust for the daughter for her absolute benefit, and Mrs. Kelly assigned and surrendered her life interest in the appointed stocks to the daughter. The stocks were accordingly transferred to the trustees of the daughter's settlement

SETTLEMENT—*continued.*

immediately after their marriage. Mrs. Kelly died and the trust funds became divisible :—

Held, that the daughter must bring into hotchpot the share appointed to her at its value at the date of the death of Mrs. Kelly.

In re KELLY'S SETTLEMENT TRUSTS. GUSTARD *v.* BERKELEY – **Warrington J. 78**

3. —— *Condition subsequent requiring Assumption of Name and Arms—Gift over on "refusal or neglect" to assume—Infant—Settlement of Real Estate.*

Testator by his will devised and appointed real estate, in strict settlement, and added a proviso directing that every person who should become entitled under his will to the estate as tenant for life or tenant in tail in possession who should not then bear the name and arms of Edwards should within six calendar months after he should have become so entitled in possession assume the surname and arms of Edwards. And in case any such person should "refuse or neglect" within the six calendar months to take, use, and bear such surname and arms, then and in every such case immediately after the expiration of the six months the limitation thereinafter contained to the use of such person should absolutely determine, and the testator gave the estate to the person or persons next in remainder under the limitations of his will.

On the assumption that a previous tenant for life had forfeited the estate by reason of her non-compliance with the proviso and that the estate had thereupon devolved upon an infant who also had not complied with the proviso :—

Held, that the words "refuse or neglect" in the proviso involved an exercise of will, and that inasmuch as in law an infant had no power (except in certain special cases) to exercise a discretion in reference to a legal matter, the testator in using those words must be taken not to include an infant.

Held, therefore, that the proviso did not apply to the infant, and that, on the above assumption, he had not forfeited the estate by reason of his "refusal or neglect" to comply with it.

Partridge v. *Partridge*, [1894] 1 Ch. 351, applied.

But *held*, on the construction of the particular provisions of the will, that the previous tenant for life had never become a "tenant for life in possession" within the meaning of the proviso, and therefore that the period at which it became incumbent upon her to assume the surname and arms had not arrived, and consequently that she had not forfeited the estate. *In re* EDWARDS. LLOYD *v.* BOYES – – **Warrington J. 541**

4. —— *Power of Revocation—Person entitled to the "actual possession"—"Under the limitations of the settlement"—Assignment by Tenant in Tail of Life Interest in Remainder—Death of Tenant for Life—Settlement—Construction.*

Under the P. settlement the P. estates stood limited to B. for life, remainder to his first and other sons successively in tail male, remainder to P. for life, remainder to his first and

SETTLEMENT—*continued.*

other sons successively in tail male, with remainders over. During the life of B., P. executed a marriage settlement which provided that in case P. should become entitled to the actual possession or the actual receipt of the rents and profits of the P. estates under the limitations of the P. settlement it should be lawful for him to revoke certain trusts declared by his marriage settlement. P. subsequently assigned his life interest in the P. estates to B. On the death of B. without issue his executors and trustees went into possession of the P. estates as assignees of the life estate of P. After the death of B., P. by a deed poll purported to exercise his power of revoking the trusts of his marriage settlement :—

Held, that, notwithstanding the assignment by P. of his life estate to B., P. on the death of B. became entitled to "the actual possession" of the P. estates "under the limitations of" the P. settlement, and that his power of revocation had consequently arisen and was effectually exercised. *In re* PETRÉ'S SETTLEMENT TRUSTS. LEGH *v.* PETRÉ – – – – **Joyce J. 290**

5. —— *Real Property — Appointment — Validity—Remoteness—Rule against Double Possibilities—Successive Limitations to Unborn Children—Election.*

The rule commonly known as the rule against double possibilities, namely, that after an estate has been limited to an unborn person for life a remainder cannot be limited to any child of that unborn person, applies to equitable as well as legal estates.

So held upon the authority of *Monypenny* v. *Dering*, (1852) 2 D. M. & G. 145.

Where by his will a testator makes an appointment which is held to be invalid as transgressing the rule against double possibilities, and also confers benefits upon the persons entitled in default of appointment, no question of election arises.

In re Oliver's Settlement, [1905] 1 Ch. 191, approved and followed.

In re Bradshaw, [1902] 1 Ch. 436, overruled.

Decision of Eve J., [1909] 2 Ch. 450, affirmed. *In re* NASH. COOK *v.* FREDERICK **C. A. 1**

6. —— *School—Trust for Benefit of National School—Gift over on School Board or Representative Body under the Education Acts being formed for the Parish—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 7, 18.

In 1892 funds were vested in trustees to be invested by them, and the income to be paid to the trustees of the National Schools at Alcester, for the purposes of education at such schools, and the carrying on of the same "until a school board or other representative body under the Education Acts shall be formed for the parish of Alcester," in which event the funds were to go to increase the endowment fund of certain almshouses. On the coming into operation of the Education Act, 1902, further payment of the income was stopped, as doubts were entertained whether the effect was to cause an event to take

SETTLEMENT—*continued.*

place on the happening of which the gift over was to take effect :—

Held, that, as the Education Act, 1902, had abolished school boards and all representative educational bodies elected or constituted for educational purposes, and had transferred all the powers which would have resided in an elected body under the Education Acts to the existing county authorities, and made them the educational authorities within their areas, no school board or other representative body under the Education Acts had been formed for the parish of Alcester, that the gift over had not taken effect, and that the income was payable to the managers of the schools. *In re* SMALLWOOD. GOTHARD *v.* CHAPMAN – – **Parker J. 272**

7. —— *Tenant for Life—Power to appoint Portions — Disentailing Deed — Mortgage of Settled Estates—Covenant for Quiet Enjoyment—Appointment of Portions—Priority—Derogation from Grant—Implied Release of Power.*

Under a marriage settlement made in 1832 estates stood limited in 1854 to the use of A. for life, remainder to the use of trustees for a long term of years to secure 20,000*l.* as portions for the younger children of the marriage, with remainder to B. (A.'s eldest son) in tail male, with remainders over ; and the settlement contained a power for A. by deed or will to appoint the further sum of 10,000*l.* as portions for younger children. In 1854 B., with A.'s consent, executed a disentailing assurance by which the estates were assured (subject to the uses and estates created by the settlement anterior to B.'s estate tail and to all powers to such precedent estates annexed) to such uses as A. and B. should by deed jointly appoint. Thereupon A. and B., in exercise of their joint power, created a mortgage over the estates ; they also created a further mortgage over the estates partly by the exercise of their joint power and partly by a grant of A.'s life estate. In each case, upon the construction placed by the Court upon the mortgages, the lands were assured by the operative part subject to the power to appoint the further sum of 10,000*l.* as portions. Each mortgage contained a joint and several covenant by the mortgagors for quiet enjoyment, "and that free and clear and freely and clearly acquitted and exonerated or released" or otherwise indemnified of, from, and against (inter alia) former or other gifts, leases, jointures, portions, and all other incumbrances whatsoever. A. died, having by his will charged the estates with the further sum of 10,000*l.* as portions for younger children. Questions of priority having arisen as between these further portions and the mortgages :—

Held, that the covenant for quiet enjoyment did not enlarge the operation of the security and did not amount to a release by A. of his power to appoint further portions ; and therefore that the further portions had priority over the mortgages.

Scrope v. *Offley*, (1736) 1 Bro. P. C. 276.

Decision of Neville J., [1909] 2 Ch. 647, affirmed.

NOTTIDGE *v.* DERING. RABAN *v.* DERING **C. A. 297**

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—— Heirlooms.
See under HEIRLOOMS.

—— Power of appointment.
See under POWER OF APPOINTMENT.

—— Will—Construction—Trusts by reference to marriage settlement – – **329**
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SEWAGE WORKS—Natural stream—Pollution—Injunction—Discharge of injunction on subsequent facts – – – **48**
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SHAREHOLDERS AND SHARES—Company.
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SHARES—Company.
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—— Stock Exchange.
See under STOCK EXCHANGE.

"**SITE**"—Charitable trust—Trustees—Decision of majority binding minority – **600**
See WILL. 3.

SOLICITOR — *Country Solicitor and London Agent—London Agent's Bill of Costs—Taxation — Order of Course — Practice—Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37—*Attorneys and Solicitors Act*, 1870 (33 *&* 34 *Vict. c.* 28), *ss.* 3, 17.

A country solicitor is entitled, under s. 37 of the Solicitors Act, 1843, as "the party chargeable," to an order of course for taxation of his London agent's bill of costs without bringing any sum of money into Court.

Smith v. *Dimes*, (1849) 4 Ex. 32, followed.

Ward v. *Eyre*, (1880) 15 Ch. D. 130, distinguished. *In re* WILDE (A SOLICITOR) **Neville J. 100**

—— Costs—Tenant for life, Sale by—Sale by auction in lots—Separate transactions
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57 Geo. 3, c. xxix., s. 80—*Michael Angelo Taylor's Act* – – – – – – **35**
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11 Geo. 4 & 1 Will. 4, c. 47, s. 3—*Debts Recovery*
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1837.

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1841.

4 & 5 Vict. c. 38, s. 2—*School Sites* – – 92
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1843.

6 & 7 Vict. c. 73, s. 37—*Solicitors* – – 100
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8 & 9 Vict. c. 18, ss. 102, 103—*Lands Clauses Consolidation* – – – – 552
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1852.

15 & 16 Vict. c. 79, s. 22—*Inclosure* – – 552
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1854.

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30 & 31 Vict. c. 131, s. 23—*Companies* – 179
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38 & 39 Vict. c. 55, s. 17—*Public Health* – 48
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38 & 39 Vict. c. 87, s. 84—*Land Transfer* – 325
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38 & 39 Vict. c. 91, s. 3—*Trade Marks Registration* – – – – – – 257
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44 & 45 Vict. c. 41, s. 14—*Conveyancing and Law of Property* – – – 777
See LANDLORD AND TENANT. 2.
44 & 45 Vict. c. 44, General Order, August, 1882, clause 6—*Solicitors Remuneration* 389
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45 & 46 Vict. c. 15—*Commonable Rights Compensation* – – – – – 552
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45 & 46 Vict. c. 38, s. 21, sub-s. ii.—*Settled Land* – – – – – 106
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1892.

55 & 56 Vict. c. 13, s. 4—*Conveyancing and Law of Property* – – – – 777
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56 & 57 Vict. c. 39, s. 49—*Industrial and Provident Societies* – – – – 513
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56 & 57 Vict. c. 53, s. 35, sub-s. 1 (ii.) (*a*)—*Trustee* – – – – – 223
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57 & 58 Vict. c. 30—*Finance* – – – 564
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59 & 60 Vict. c. 25, s. 8, sub-s. 1 ; s. 70, sub-ss. 1, 2, 3 ; s. 71, sub-s. 1 ; s. 74—*Friendly Societies* – – – – – 228
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62 & 63 Vict. c. 29, s. 2—*Baths and Washhouses* 347
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2 Edw. 7, c. 42, ss. 7, 13—*Education* – 272
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4 Edw. 7, c. 34—*Irish Land* – – – 106
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5 Edw. 7, c. 15, ss. 7, 39—*Trade Marks* – 257
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7 Edw. 7, c. 50, s. 28—*Companies* – – 574
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8 Edw. 7, c. 69, ss. 7, 45, 48, 69; Table A, art. 4 —*Companies (Consolidation)* – 414
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9 Edw. 7, c. 49, ss. 1, 15, 34, 38—*Assurance Companies* – – – – 574
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STAYING PROCEEDINGS — Disputes between society and members—Rules—Arbitration—Ultra vires acts – – 513
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—— Partnership — Mortgage of partner's interest — Right of mortgagee to account—Arbitration clause – – 732
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STOCK EXCHANGE—*Broker and Client—Purchase of Shares — Carry over — Commission — "Net" Charge including Broker's Remuneration and Contango—Non-Disclosure to Client—Secret Profit—Mortgage of Shares—Blank Transfer—Implied Power of Sale—Wrongful Conversion.*

In November, 1904, the plaintiff instructed brokers on the London Stock Exchange to buy certain mining shares for him, it being understood that the shares were not to be taken up on the settling day, but were to be carried over. No agreement was made as to the remuneration of the brokers for arranging the carry over. The brokers bought the shares from a jobber, and in the bought notes sent by them to the plaintiff they charged an opening commission of 1*s.* per share. They arranged the carry over with the jobber, and the first continuation account sent by them to the plaintiff contained a charge of "8½*d.* net." The shares were carried over in this way every fortnight until January, 1906, the "net" rate varying with the market price of the shares. The plaintiff having failed to pay the balance against him on the mid October, 1905, carry over, they pressed for payment, and the plaintiff deposited with them as security a certificate for 390 gas shares, and signed a blank transfer of the same. The fortnightly balances continued adverse to the plaintiff and were not paid by him, and, after repeated applications to the plaintiff for payment, the brokers, in January, 1906, closed the account with a balance of 69*l.* 10*s.* against him, and sold the 390 shares for 162*l.* 10*s.*

Throughout the above transactions the plaintiff thought that the "net" rate charged for every carry over represented only the jobber's contango; but it included also, in fact, a charge by the brokers for arranging the carry over which they did not disclose to the plaintiff. It appeared that the "net" rate was well known on the Stock Exchange to indicate that with the jobber's contango was included the broker's remuneration, and that the charge of the brokers, which amounted in the aggregate to 17*l.* odd, was reasonable.

The plaintiff brought an action against the brokers for an account and payment of the secret profit made by them in carrying over the mining shares and for damages for wrongful conversion of the gas shares. The defendants counterclaimed for payment of reasonable remuneration for carrying over the mining shares:—

Held, first (reversing Neville J. [1910] 1 Ch. 195), that the defendants, not having been guilty of any breach of duty as agents, were entitled to retain the 17*l.* as reasonable remuneration; secondly (affirming Neville J.), that in the circumstances the implied power of sale was reasonably exercised.

Per Cozens-Hardy M.R. and Buckley L.J.: In the case of a mortgage of shares by deposit of the share certificate together with a blank transfer the fact that the mortgagee in giving notice requiring payment makes a mistake as to the amount due on the mortgage and demands too much is not a ground for invalidating the exercise of his implied power of sale.

And *semble* the same principle applies to the case of a pledge.

Pigot v. *Cubley* (1864), 15 C. B. (N.S.) 701, explained. STUBBS *v.* SLATER – **C. A. 632**

STREAM—*Natural Stream—Pollution—Sewage Works—Injunction—Discharge of Injunction on subsequent Facts—Statutory Offence by Public Body—Remedy—Right of Attorney-General to Injunction—Discretion—Local Sanitary Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 17.

The only prohibition contained in s. 17 of the Public Health Act, 1875 (so far as regards natural streams), is against conveying into any natural stream such sewage or filthy water as will prejudicially affect the purity of the stream. Therefore where sewage or other filthy water is

STREAM—*continued.*

conveyed into an already polluted stream no offence is committed against the section unless the stream is thereby made fouler than it was before.

Kekewich J. having granted, at the instance of the Attorney-General, a perpetual injunction to restrain a public drainage board from discharging sewage water into a river in contravention of s. 17 of the Public Health Act, 1875, the defendants appealed; but upon the appeal they did not contest that the injunction was properly granted on the facts existing at the trial. The defendants, however, obtained successive adjournments of the appeal to enable them to complete certain sewage works upon which they were engaged in order to comply with the section. The works having been completed at an enormous cost, and there being a conflict of evidence as to their sufficiency, the Court referred the matter to an expert to report, and he reported in favour of the defendants.

In these circumstances, it appearing that there was no longer any breach of the section, and the defendants undertaking to use their best endeavours to prevent any future breach, the Court discharged the injunction, the appellants to pay the costs of the appeal.

The Attorney-General, complaining that a public body is committing an offence against a statute, is not entitled as a matter of right, on proving his case, to an injunction.

Dicta of Farwell J. in *Attorney-General* v. *Wimbledon House Estate Co.*, [1904] 2 Ch. 34, 42, and of Vaughan Williams L.J. in *Attorney-General* v. *London and North Western Ry. Co.*, [1900] 1 K. B. 78, 87, approved.

Dictum of Kekewich J. overruled.

Appeal from a decision of Kekewich J., [1908] 2 Ch. 551. ATTORNEY-GENERAL *v.* BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD - - - **C. A. 48**

STREETS — *Compulsory Purchase — Widening Street—Notice to Treat — Withdrawal — Compensation—Local Government—Michael Angelo Taylor's Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 80.

Where a landowner has been served with a notice to treat under the compulsory powers of Michael Angelo Taylor's Act, he must either treat the notice as good or repudiate it as a whole; he cannot accept it in part and repudiate it in part.

Where a landowner has declined to accept or has repudiated the validity of a notice to treat, the local authority is entitled to withdraw it altogether, and cannot be compelled to proceed with that part of it which is acceptable to the landowner.

In such a case no compensation by way of damages will be given to the landowner.

Decision of Eve J., [1909] 2 Ch. 287, affirmed. WILD *v.* WOOLWICH BOROUGH COUNCIL **C. A. 35**

SUB-LETTING — Lease — Forfeiture, Relief against — Breach of covenant not to sub-let without consent — Effect of negligence - - - - **777**
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SURETY—Principal and.
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SURRENDER — Appointor's life interest — Immediate possession — Death of appointor—Hotchpot - - - **78**
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TAXATION—Solicitor's costs.
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TENANT FOR LIFE—Death of—Assignment by tenant in tail of life interest in remainder - - - - **290**
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See under SETTLED LAND.

TESTAMENTARY EXPENSES—Estate duty—Insufficient general personal estate to pay duty—Marshalling - - **564**
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TIME—Appeal—Dismissal of action as frivolous and vexatious—Interlocutory or final order - - - - - **489**
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TITLE—Vendor and purchaser.
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TRADE —Restraint on—Director—Contract of service—Winding-up — Repudiation — Specific performance - - - **336**
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TRADE MARK—*Registered Mark — Innocent Infringer—Injunction—Whether Plaintiff also entitled to Compensation—Practice — Register of Trade Marks—Notice—Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 3—*Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 7, 39.

When a registered trade mark is innocently infringed the proprietor of the trade mark is entitled to an injunction against the offender, but not to an account of profits or an inquiry as to damages unless the offender continues to infringe after notice of the proprietor's right.

The principle of *Edelsten* v. *Edelsten*, (1863) 1 D. J. & S. 185, applied.

The register of trade marks does not operate as notice to the public of the existence of a registered mark. SLAZENGER & SONS *v.* SPALDING & BROTHERS - - - **257**

2. —— *Registration — Distinctive Mark — "Perfection" — "Adapted to distinguish" — User — Evidence — Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *sub-s.* 5.

The word "Perfection" applied to soap is prima facie not a distinctive mark or "adapted to distinguish" the goods of the proprietor of the mark from those of other persons so as to be capable of registration as a trade mark under s. 9, sub-s. 5, of the Trade Marks Act, 1905.

Evidence that the user of the word as a trade mark has rendered it in fact distinctive of the

TRADE MARK—*continued.*

proprietor's goods to many persons in certain large areas of the United Kingdom, but not to many other persons in those areas, and to scarcely any one outside those areas, is not sufficient to make the mark "distinctive" or "adapted to distinguish" within the section.

In re JOSEPH CROSFIELD & SONS, LIMITED
Swinfen Eady J. 118
See next Case.

3. —— *Registration—Special Application—Distinctive Word—User—Laudatory Epithet—Geographical Name—Misspelling of Descriptive Word—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *sub-s.* 5; *ss.* 11, 44.

A mere laudatory epithet cannot acquire by user the quality of distinctiveness within s. 9, sub-s. 5, of the Trade Marks Act, 1905, so as to render it capable of registration as a trade mark.

A word not being an invented word ought not to be put on the register if the spelling is phonetic and resembles in sound a word which in its proper spelling could not be put on the register.

Per Fletcher Moulton L.J.: The Court has jurisdiction under s. 9, sub-s. 5, to permit registration of words having a direct reference to the character or quality of the goods, as well as geographical terms, but it is for the applicant to prove that words prima facie unsuitable for registration have acquired distinctiveness, and the extent to which the Court will require the proof of this acquired distinctiveness to go will depend upon the character of the word. In determining whether a word prima facie descriptive ought to be admitted to registration as a trade mark the Court ought to consider whether the registration will cause substantial difficulty or confusion in view of the provision in s. 44 that no registration shall interfere with the use by any person of any bona fide description of the character or quality of his goods.

Upon a special application to register the word "Perfection" as a trade mark for common soap it was proved that for many years past the applicants had advertised their soap under that name, and had also used the name upon the cakes of soap sold by them, but always in conjunction with their own name, and that in many parts of England the applicants' soap had become known to a large extent as "Perfection" soap:—

Held, that the word ought not to be admitted to registration.

Decision of Swinfen Eady J., [1910] 1 Ch. 118, affirmed.

A special application to register the words "California Syrup of Figs" for an aperient medicine was referred by the Board of Trade to the Court. The evidence established a prima facie case of the words having become identified by long user with the goods of the applicant:—

Held, that the application ought to be allowed to proceed.

Decision of Warrington J., [1909] 2 Ch. 99, reversed.

An application was made to expunge from the register several trade marks consisting of the word "Orlwoola," registered under the Patents,

TRADE MARK—*continued.*

Designs, and Trade Marks Acts, 1883 and 1888, for (amongst other things) woollen goods, with a disclaimer in each case of the words "all wool." These marks had been extensively used for many years in connection with unshrinkable woollen goods:—

Held, that "Orlwoola" was merely a misspelling of "all wool"; that if the goods to which the word was applied were entirely composed of wool the word was descriptive, and, if not, was deceptive; and that the trade marks were not registrable either under the Act of 1905 or under the previous Acts and ought to be expunged.

Decision of Eve J. reversed. *In re* JOSEPH CROSFIELD & SONS, LIMITED. *In re* CALIFORNIA FIG SYRUP COMPANY. *In re* H. N. BROCK & Co., LIMITED – – **C. A. 130**

TRADE NAME—*Passing-off Action—Parties—Practice—Injunction.*

For many years the plaintiffs manufactured and sold tyres for cycles and motor cycles under the name of "Warwick," and by the year 1905 that name was distinctive and meant to the trade and to the public tyres of their manufacture. In 1905 they transferred their business with the exclusive right to manufacture and sell Warwick tyres to the Dunlop Company for a term of years, but did not assign the goodwill in their trade name of "Warwick" to that company. The plaintiffs never manufactured or sold tyres for motor cars, nor did the Dunlop Company sell such tyres under the name of "Warwick." The defendants manufactured and sold only tyres for motor cars, and in 1908, the name of their managing director being Warwick, commenced to sell their motor tyres under the name of "Warwick motor tyres." In an action by the plaintiffs to restrain the defendants from using the name "Warwick" in connection with the sale of the defendants' motor tyres on the ground that such user was calculated to lead the public to believe that the defendants' motor tyres were tyres of the plaintiffs' manufacture:—

Held, on the evidence, that the plaintiffs were entitled to an injunction.

Held, also, that the plaintiffs, although they were not themselves manufacturing or selling their Warwick tyres, were the proper parties to sue, as they had not parted with the goodwill in their trade name "Warwick," and that the Dunlop Company were not necessary parties to the action. WARWICK TYRE COMPANY, LIMITED *v.* NEW MOTOR AND GENERAL RUBBER COMPANY, LIMITED – **Neville J. 248**

TRANSFER — Company — Debenture stockholder's action—No condition protecting transferees against equity—Retention of shares of stockholder and his transferees – – – – **239**
See COMPANY. 1.

—— Company — Shares — Executors—Production of probate—Transfer to one executor — Nominal consideration — Breach of trust – – – – – **444**
See COMPANY. 7.

TRANSFER—*continued.*

—— Company — Winding-up — Contributory—Transfer of shares to escape liability—Validity – – – – – **312**
See COMPANY. 9.

—— Land transfer—Registration—Conditions annexed to title – – – **325**
See VENDOR AND PURCHASER. 3.

—— Land transfer.
See under LAND TRANSFER.

—— Life assurance company—Liquidation—Transfer of business to another company—Deposit—Repayment – **458**
See INSURANCE (LIFE).

—— Mortgage of shares—Blank transfer—Implied power of sale—Wrongful conversion – – – – – **632**
See STOCK EXCHANGE.

—— Trustees not bound to enforce transfer—Next of kin claiming benefit of covenant—Volunteers – – – – **609**
See SETTLEMENT. 1.

TRIAL—Costs—Taxation—Motion heard with witnesses and treated as trial—Counsel's fees – – – – – – **410**
See PRACTICE. 2.

TRUST—Precatory trust—"I wish"—Absolute gift—Codicil directing use of legacy for charitable purposes – – – **215**
See WILL. 1.

—— Precatory trust for charity—"I specially desire"—Absolute gift—Gift on condition – – – – – – **219**
See WILL. 2.

—— Settlement.
See under SETTLEMENT.

TRUSTEE—Breach of trust—Company—Shares—Production of probate—Transfer to one executor—Nominal consideration **444**
See COMPANY. 7.

—— Charitable trust — "Site" — Trustees — Decision of majority binding minority **600**
See WILL. 3.

—— Company — Stockholder a trustee and director—Alleged debt by stockholder to company—Retention of shares of stockholder and his transferees – **239**
See COMPANY. 1.

—— Duties of trustees—Capital money—Investment in stock – – – – **389**
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—— Infant—Vesting order—Stock in name of infant and another to which infant is entitled—Form of order – – **223**
See PRACTICE. 3.

—— Settlement — Agreement to settle wife's after-acquired property—Next of kin—Trustees not bound to enforce transfer **609**
See SETTLEMENT. 1.

TUNNEL—Railway—Severed lands—Grant of right to make "a tunnel"—Uncertainty—Perpetuity—Assignability – **12**
See RAILWAY.

ULTRA VIRES—Chartered company—Breach of charter – – – – – **354**
See CONFLICT OF LAWS.

—— Company—Gratuitous payment—Pension to retired officer – – – **179**
See COMPANY. 8.

—— Railway—Severed lands—Grant of right to make "a tunnel"—Uncertainty—Perpetuity—Assignability – – – **12**
See RAILWAY.

ULTRA VIRES ACTS—Disputes between society and members — Rules — Arbitration — Stay of proceedings – – – **513**
See INDUSTRIAL AND PROVIDENT SOCIETY.

UNCERTAINTY — Railway — Severed lands — Grant of right to make "a tunnel"—Perpetuity—Assignability – – **12**
See RAILWAY.

USER—Trade mark—Distinctive word – **130**
See TRADE MARK. 3.

VENDOR AND PURCHASER — *Conveyance — Plan.*

In simple cases a purchaser is entitled to have land conveyed to him by reference to a plan on his conveyance. *In re* SANSOM AND NARBETH'S CONTRACT – **Swinfen Eady J. 741**

2. —— *Practice — Specific Performance — Default in Payment by Purchaser—Forfeiture of Deposit—Form of Order.*

A contract for the sale of land contained a provision for the forfeiture of the deposit on failure by the purchaser to comply with any of the conditions of sale, giving the vendor power to resell, and providing that any deficiency in price which might happen on the resale should be paid by the purchaser to the vendor and in case of non-payment be recoverable by the vendor as liquidated damages. The purchaser paid a deposit but failed to complete the contract. In an action for specific performance the vendor moved for an order forfeiting the deposit and for liberty to resell, and in case the property should be resold for less than the contract price that the purchaser should pay to the vendor the difference between the contract price and the price realized on the resale :—

Held, that the vendor must give credit for the amount of the deposit.

The form of order in *Griffiths* v. *Vezey*, [1906] 1 Ch. 796, observed upon. SHUTTLEWORTH *v.* CLEWS – – – **Joyce J. 176**

3. —— *Restrictive Covenants — Building Scheme—Right of Purchasers inter se—Land Transfer—Registration—Conditions annexed to Title—Land Transfer Act*, 1875 (38 & 39 *Vict.*

VENDOR AND PURCHASER—*continued.*

c. 87), *s.* 84—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *Sched. I.*

In 1903 fourteen acres, forming part of the D. estate, were conveyed to Holmes, who covenanted with the vendor and the owner for the time being of the estate to observe certain restrictive conditions under which only dwelling-houses were to be built on the land, so as to bind the hereditaments thereby conveyed into whosesoever hands the same should come. Holmes caused himself to be registered in the Land Registry as proprietor of the fourteen acres. The restrictive conditions were not entered at the time, but on April 6, 1905, they were entered on the register as affecting the whole of the land comprised in the title. On the same day Holmes transferred a plot of land, forming part of the fourteen acres, to the plaintiff, who covenanted to observe the conditions. In 1907 Holmes conveyed the plot adjoining the plaintiff's plot to four purchasers, who built a church thereon. The plaintiff brought an action against Holmes and the four purchasers for an order directing them to pull down the church, and for damages :—

Held, that the registration of the restrictive conditions did not entitle one purchaser from Holmes to enforce the conditions against another purchaser or against the common vendor, in the absence of proof of a building scheme, and that the action failed.

Decision of Warrington J., [1910] 1 Ch. 84, affirmed.

WILLÉ *v.* ST. JOHN – – – **C. A. 325**

4. —— *Title — Forcing Doubtful Title — Difficult Question of Construction—Procedure — Vendor and Purchaser Summons—Originating Summons—Costs.*

Where a vendor's title to land depends upon a question of construction involving real difficulty the proper mode of getting that question determined is by originating summons and not by a vendor and purchaser summons, and if the vendor insists upon proceeding by vendor and purchaser summons it is competent to the Court to declare the title too doubtful to force upon a purchaser.

An agreement was made for the sale of freehold ground rents, the title to which depended upon the construction of an obscure will. The purchaser having objected to the title, the vendors took out a vendor and purchaser summons for the purpose of getting the question of construction determined. Neville J. offered to adjourn the case to enable the vendors to take out an originating summons, and, on the refusal of this offer, held that the title was too doubtful to force upon the purchaser. The vendors appealed, and on the appeal the Court made the same offer, which was accepted. Upon the originating summons the question of construction was decided in favour of the vendors, and on the adjourned hearing of the appeal it was declared that the vendors had shown a good title, and the order of Neville J. was discharged on the subsequent matter :—

Held, that the vendors ought to pay the costs of the appeal and in the Court below. *In re* NICHOLS' AND VON JOEL'S CONTRACT **C. A. 43**

—— Corporate lands — Power to sell — Consideration—Perpetual rent-charge – **68**
See CORPORATION.

—— Sale.
See under SALE.

VESTING ORDER—Infant—Stock in name of infant and another to which infant is entitled—Form of order – – **223**
See PRACTICE. 3.

VOLUNTEERS—Agreement to settle wife's after-acquired property—Next of kin claiming benefit of covenant – – – **609**
See SETTLEMENT. 1.

WAIVER—Lease—Forfeiture, Relief against—Onus as to proving lessor's knowledge of the facts – – – – **777**
See LANDLORD AND TENANT. 2.

WASHHOUSES — Baths and — Public baths — Letting for music and dancing—Taking money at the doors – – – **347**
See LOCAL GOVERNMENT.

WASTE—Consent not to plough up pasture lands—Good husbandry – – **437**
See LANDLORD AND TENANT. 1.

WIFE—Husband and.
See under HUSBAND AND WIFE.

WILL—*Absolute Gift—Codicil directing Use of Legacy for Charitable Purposes — Precatory Trust—"I wish"—Will—Construction.*

A testatrix by her will gave to R. a legacy of 2300*l.* By a codicil dated the same day as the will she declared as follows : "I wish R. to use 1000*l.*, part of the legacy given to him by my above will, for the endowment in his own name of a cot in the I. hospital, and to retain the balance of the said legacy for his own use and benefit." By a second codicil in 1905 she declared : "I wish R., after endowing a cot as provided by the first codicil, to use the balance of the legacy given to him by my will for such charitable purposes as he shall in his absolute discretion think fit." R. disclaimed the legacy :—

Held, that a trust was created for the charitable purposes mentioned in the codicils. *In re* BURLEY. ALEXANDER *v.* BURLEY **Joyce J. 215**

2. —— *Absolute Gift—Gift on Condition—Precatory Trust for Charity—"I specially desire"—Will—Construction.*

Testator gave to his brother W. his share in a leasehold house "and to my sisters A. and L. equally the rest of my stocks and shares, subject to a legacy, duty free, provided by the above three legatees of 1000*l.* to my cousin E. R. C., the said E. R. C. to be, with my brother W., my co-executor and trustee for my sisters A. and L." Then, after making a further specific request,

WILL—*continued.*

the will concluded as follows: "I specially desire that the sums herewith bequeathed shall, with the exception of the 1000*l.* to E. R. C., be specifically left by the legatees to such charitable institutions of a distinct and undoubted Protestant nature as my sisters may select, and in such proportions as they may determine":—

Held, that the sisters took their legacies absolutely. *In re* CONOLLY. CONOLLY *v.* CONOLLY - - - - **Joyce J. 219**

3. —— *Charitable Trust—"Site"—Trustees—Decision of Majority binding Minority—Will—Construction.*

A testator, after appointing trustees for the general purposes of his will, directed them, out of the proceeds of sale of his residuary real and personal estate, to set apart and appropriate a sum amounting as nearly as might be to 1,000,000*l.*, and to pay the same to the plaintiff and others, to be called the "W. H. trustees," who should stand possessed of the same upon trust from time to time to lay out a sufficient part of the said trust legacy in the purchase of freehold "lands situate in some or one of the western suburbs of London, or in the adjacent country," to be selected by the W. H. trustees "as a site" for the erection of buildings to be used as homes for aged poor persons and to be called "Whiteley Homes for the aged poor," or by such other name or names as the W. H. trustees should think fit, but so that the name of "Whiteley" should form part of such name or names. The will contained further directions that the "site" to be selected should be in a bright and healthy "spot," even if "such a site" could only be acquired at additional expense. The W. H. trustees were also given a very wide discretion in determining the name of the homes and administering the trust generally, and their minimum number was to be nine. Upon a summons taken out by eight out of the ten trustees against the other two trustees:—

Held—(1.) that upon the true construction of the will the W. H. trustees were not entitled to select more than one site for the homes.

(2.) That the rule stated in *Wilkinson* v. *Malin*, (1832) 2 Tyrw. 544, 571, that in the administration of a trust of a "public" nature the act of the majority was to be treated as the act of the whole body, applied equally to a trust of a "charitable" nature; and therefore, in selecting a site and in founding the homes, the decision of the majority of the W. H. trustees was binding upon the minority. *In re* WHITELEY. BISHOP OF LONDON *v.* WHITELEY **Eve J. 600**

4. —— *Class—"Next of kin whoever they may be"—Will—Construction.*

A testator directed the trustees of his will to raise and set apart six sums of 15,000*l.* each, and to hold each of the same upon trust to pay the income to a niece (or nephew) for life, and after her (or his) death to her (or his) husband (or wife), such husband (or wife) to take only half the income if there were issue, and, after trusts in favour of the issue, declared that "in the event of the death of the said niece" or nephew

WILL—*continued.*

"without issue, or in the event of her" (or "his") "having issue and of such issue happening to die before becoming entitled to the whole of the said trust fund of 15,000*l.*," the trustees should stand possessed of the same "subject to the aforesaid provisions in favour of my said niece" (or "nephew") "and her" (or "his") "said husband" (or "wife") "Upon trust for my next of kin, whoever they may be, living at the time of the trusts failing as aforesaid, except the children or other descendants of my nephew T. W. deceased."

The residue was given to the six nephews and nieces, each of whom was tenant for life of one of the sums of 15,000*l.*

The testator was seventy-three years old when he made his will (in 1854) and he died in 1855. The six nephews and nieces were his sole next of kin at the time of his death and would have been his sole next of kin if he had died immediately after making his will. S., who was the last of them, died in 1902 without issue, leaving a widow, who died in 1909:—

Held, that, although the class of next of kin was to be ascertained at the time of the testator's death, only those took who survived the time when the previous trusts failed, and that on the death of the widow of S. his 15,000*l.* fell into residue.

In re Nash, (1894) 71 L. T. 5, followed. *In re* WINN. BROOK *v.* WHITTON - **Parker J. 278**

5. —— *Gift of Income to Daughter until Marriage—Gift over on Marriage—Death of Daughter unmarried — Indefinite Gift of Income — Absolute Gift — Determinable Life Interest—Will—Construction.*

A testatrix directed the trustees of her will to pay the income of her residuary estate to her daughter until she should marry and after her marriage to pay to her thereout a legacy of 3000*l.* and divide the balance between all her (the testatrix's) sons surviving her:—

Held, (1.) that the interest of the daughter in the residue under the direction to pay her the income was for life or until her marriage; (2.) that the gift over to the sons took effect on the death of the daughter unmarried.

Rishton v. *Cobb*, (1839) 5 My. & Cr. 145, distinguished. *In re* MASON. MASON *v.* MASON - - - - - **C. A. 695**

6. —— *Gift to A., B., C., and their Children—Gift over on Death of A., B., or C. leaving no Issue—Realty—Chattels Real—Gift in Succession—Executory Bequest or Limitation over on Death of Parent—Rule in* Wild's Case—*Will—Construction.*

By his will the testator gave his leasehold and real estate to his wife for her life, and on and immediately after her death he gave "whatever may be left" after the discharge of all claims against his estate to his children, namely, as to two-fifths to his son and as to the other three-fifths to his two daughters in two equal shares, share and share alike, "and to the child or children of the three said children. In case any of my children dying and leaving no legal issue, the share or shares of those dying to be given to

the surviving child or children of such as will be dead My daughters' and granddaughters' shares to be independent and free from all husbands." His wife survived the testator. Only one of the grandchildren was born during her life. On a summons by the three children for the determination of their interests :—

Held, that no child of the testator was at present entitled to his or her share absolutely, but that such share was subject upon the death of the child to an executory bequest or limitation over to his or her children, and also subject to the gift over in case of any of the children dying and leaving no legal issue, the meaning of which would have to be decided when, if ever, the event happened.

The rule in *Wild's Case* (1599), 6 Rep. 16 b, has no application where the gift or devise to the children would without reference to the rule be a gift in succession to, and not concurrently with, their parent. *In re* JONES. LEWIS *v.* LEWIS - - - - **Joyce J. 167**

7. —— *Revocation—Will and Codicil—Construction—Implied Revocation—Appointment of B. N. as Executor—Legacy as Executor—Share of Residue—Codicil—Revocation of Appointment and Legacy—Substitution of H. F. as Executor—Will to take effect as if H. F. were inserted throughout instead of B. N.*

A testator appointed B. N. to be one of the executors and trustees of his will and bequeathed to him, if he should prove the will, and in addition to any other benefit to which he might be entitled under the will, a legacy of 1000*l.*, and ultimately gave a share of residue to B. N. By a codicil the testator, after referring to the appointment of B. N. as an executor and to the legacy of 1000*l.*, revoked the appointment and legacy and appointed H. F. to be an executor in the place of B. N., and gave H. F. a legacy of 200*l.* for his trouble in acting as such executor and declared that his will should be construed and take effect as if the name of H. F. were inserted in his will throughout instead of the name of B. N. :—

Held, that the general direction at the end of the codicil did not operate as an implied revocation of the gift of the share of residue to B. N. *In re* FREEMAN. HOPE *v.* FREEMAN **C. A. 681**

8. —— *Share of Residue—Absolute Gift—Subsequent Provision for Settlement of Married Daughter's Share — Trust by Reference to Marriage Settlement—"Subsisting and capable of taking effect"—Default of Issue—Ultimate Trust for Testator, "his executors administrators and assigns"—Daughter absolutely entitled—Will—Construction.*

The testator gave his residuary estate to trustees upon trust for his children living at his decease as tenants in common, and then directed that the share which "would belong to" any daughter who at his death should be or have been married should "go and be paid to" the trustees of her marriage settlement, to be held upon the same trusts as were thereby declared of

the moneys thereby settled by him upon such daughter or such of them as should be then subsisting and capable of taking effect.

The ultimate trust of the moneys settled by the testator upon the marriage of his daughter, Mrs. C., who survived him and her husband, was a trust in default of issue of Mrs. C. (as happened) for the testator, his executors, administrators, and assigns :—

Held, that in the events which had happened there was no valid effective trust declared by the testator's will of Mrs. C.'s aliquot share of residue upon her death without having issue, and that the share devolved upon her legal personal representative.

The rule in *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 551, applied.

In re CURRIE'S SETTLEMENT. *In re* ROOPER. ROOPER *v.* WILLIAMS **Joyce J. 329**

9. —— *Tenant for Life and Remainderman — Trust for immediate Conversion of a Business —No Power to Postpone—Direction as to "all the income arising from my estate" until Conversion —Profits of Business—Capital or Income—Will —Construction.*

A testator devised and bequeathed the residue of his property, whether real or personal, to trustees, upon trust for sale and conversion at such times and in such manner as they should think fit, but as to his business carried on in Sicily that they should wind up and dispose of the same as soon as practicable after his death, and if possible within twelve months thereof. There was express power to postpone the conversion of any part of his property other than the business. He then gave his wife a life interest in the income of his estate, and, subject thereto, his infant daughter was entitled to the whole estate contingently on attaining twenty-one or being married. The will contained a subsequent declaration by the testator that "all the income arising from my estate" should, until conversion, be applied as if it were income arising from the proceeds of the conversion, no part thereof being liable to be retained as capital.

Upon a summons to determine whether the profits of the business earned since the testator's death should be treated as income or be divided between capital and income :—

Held, that the expression "all the income arising from my estate" included the profits arising from the business.

Held, further, that there was no sufficient ground for limiting the application of the clause giving to the tenant for life the income of unconverted property to that part of the estate which was subject to the discretionary power to postpone ; and the widow was therefore entitled to the profits of the business.

In re Chancellor, (1884) 26 Ch. D. 42, and *In re Crowther*, [1895] 2 Ch. 56, followed. *In re* ELFORD. ELFORD *v.* ELFORD **- Eve J. 814**

10. —— *Trusts of Real Estate—Power of Sale—Partial Failure of Trusts—Intestacy—Conversion after Death of Heir-at-Law—Real or Personal Estate.*

A testator devised real estate upon trust for

WILL—*continued.*

A. for life with a gift over upon trusts that failed in A.'s lifetime, so that the equitable remainder in fee became vested in the testator's heir-at-law; and the testator gave his trustees an absolute power of sale over the real estate. The heir-at-law died intestate before the real estate was converted by the exercise of the power :—

Held, that the real estate was not converted until the power of sale was exercised, and that the person entitled to the real estate of the heir at the date of the sale, and not his legal personal representative, was entitled to the proceeds of sale. *In re* DYSON. CHALLINOR *v.* SYKES
Neville J. 750

—— Administration—Executor—Imperfect gift of personalty – – – – **188**
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—— Charity—Will—Construction.
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—— Estate duty—Incidence—Appointment of specified amounts—Residue of fund
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See under HEIRLOOMS.

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WITHDRAWAL—Notice to treat—Compensation—Compulsory purchase—Widening street – – – – – **35**
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—— "Clog" on redemption – – – **620**
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—— "Current market prices" – – **262**
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—— "I specially desire" – – – **219**
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—— "I wish" – – – – – **215**
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—— "Landlord" – – – – – **480**
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—— "Net" charge – – – – **632**
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—— "Person" – – – – – **806**
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—— "Person" (respectable and responsible) – – – – – **754**
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—— "Refusal or neglect" – – – **541**
See SETTLEMENT.

—— "Rent" – – – – – – **480**
See LANDLORD AND TENANT.

—— "Site" – – – – – – **600**
See WILL.

—— "Tie" – – – – – – **620**
See MORTGAGE.

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